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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 464.

JESSIE NORTON TORRENCE MAGOUN, APPELLANT,

vs.

ILLINOIS TRUST AND SAVINGS BANK, AS EXECUTOR
AND TRUSTEE UNDER THE LAST WILL AND TESTA-
MENT OF JOSEPH T. TORRENCE, DECEASED, AND
DANIEL H. KOCHERSPERGER, AS COUNTY TREAS-
URER AND EX OFFICIO COUNTY COLLECTOR OF THE
COUNTY OF COOK, ILLINOIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS

FILED SEPTEMBER 25, 1897.

(16,677.)

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BLEED THROUGH

(16,677.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 25, 1897.

1 Pleas in the circuit court of the United States for the northern district of Illinois, northern division, in chancery sitting, at the United States court-room, in the city of Chicago, in said district and division, before the Honorable John W. Showalter, circuit judge of the United States for the seventh judicial circuit, on Tuesday, the twenty-first day of September, in the July term of said court, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the one hundred and twenty-second year.

S. W. BURNHAM, *Clerk*.

JESSIE NORTON TORRENCE MAGOUN

vs.

ILLINOIS TRUST AND SAVINGS BANK, as Executor
and Trustee under the Last Will and Testament
of Joseph T. Torrence, Deceased, and Daniel H.
Kochersperger, as County Treasurer and *ex Officio*
County Collector of the County of Cook, in the
State of Illinois.

In Chancery.

Be it remembered that on this day, to wit, the twenty-first day of September, in the year of our Lord one thousand eight hundred and ninety-seven, came the complainant in said entitled cause, by her solicitors, and filed in the clerk's office of said court her bill of complaint; which said bill of complaint is in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } ss:

In the Circuit Court of the United States of America for the Northern District of Illinois, Northern Division. In Chancery.

To the honorable the judges of said court, in chancery sitting:

Your orator, Jessie Norton Torrence Magoun, brings this her bill of complaint against The Illinois Trust and Savings Bank, as executor and trustee under the last will and testament of Joseph T. Torrence, deceased, and Daniel H. Kochersperger, as county treasurer and *ex officio* county collector of Cook county, in the State of Illinois, and thereupon, humbly complaining, shows unto your honors:

First. That this is a suit of a civil nature in equity; that the amount in dispute, exclusive of interest and costs, exceeds the sum of five thousand dollars; that it is a controversy between citizens of different States, and arises under the Constitution and laws of the United States, and that your orator is without adequate relief in the premises except in a court of equity.

Second. That your orator is a citizen and resident of the State of New York, in the United States of America, and that her place of residence is Westbury, on Long island, in said State of New York.

3 Third. That said Illinois Trust and Savings Bank, the executor and trustee under the last will and testament of Joseph T. Torrence, deceased, as hereinafter averred, is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and is a citizen and resident of the county of Cook, in the State of Illinois, and that the principal office and place of business of said Illinois Trust and Savings Bank is in the city of Chicago, county of Cook and State of Illinois.

Fourth. That said Daniel H. Kochersperger, the county treasurer and *ex officio* county collector for Cook county, in the State of Illinois, is a citizen of the State of Illinois, in the United States of America, and that his residence is in the city of Chicago, county of Cook, in the State of Illinois.

Fifth. That said Joseph T. Torrence was in his lifetime and up to the time of his death a citizen and resident of the county of Cook, in the State of Illinois, and that, being a citizen and resident of said State of Illinois, said Joseph T. Torrence, on or about the thirty-first day of October, A. D. 1896, departed this life at Chicago, leaving a last will and testament and codicil thereto, both duly signed and attested, copies of which are hereto attached, marked respectively Exhibit A and Exhibit B, and made a part hereof, the same as if here set out in full.

4 Sixth. That in and by said will the said Joseph T. Torrence nominated and appointed said Illinois Trust and Savings Bank executor of and trustee under the said will.

Seventh. That said will and codicil were both duly proved and admitted to record in the probate court of said Cook county, in the State of Illinois, on the fifth day of November, 1896; and thereupon, on the same day, letters testamentary on the said will and codicil were duly issued out of the said probate court to said Illinois Trust and Savings Bank, a copy of which letters is hereto attached, marked Exhibit "C," and made a part hereof, the same as if here set out in full, and said letters testamentary still remain in full force and unrevoked.

Eighth. That said Illinois Trust and Savings Bank accepted the trusts confided to and imposed upon it by the said will, codicil, and letters testamentary, and is now the duly qualified and acting executor of and trustee under the said last will and testament and has a charge and trust in the legacies or property for distribution under said will.

Ninth. That said estate is still pending, unsettled, and in process of administration in said probate court of Cook county.

Tenth. That your orator is the daughter of said Joseph T. Torrence, deceased, and the beneficiary named in the fourth article of said will and in the said codicil.

5 Eleventh. That said Joseph T. Torrence died seized and possessed of property which exceeded in value the sum of six hundred and twenty-five thousand dollars (\$625,000), all of which was at the time of his death and now is within the State of Illinois and all of which passed by said will and codicil.

Twelfth. That said estate is solvent and exceeds in value the

sum of six hundred thousand dollars (\$600,000) over and above all just claims and debts.

Thirteenth. That property which was of the said Joseph T. Torrence at the time of his death and was within the State of Illinois was of a clear market value of more than five hundred thousand dollars (\$500,000), and the beneficial interest therein and the income therefrom passed by said will to and for the use of your orator, a child of said Joseph T. Torrence, deceased, and that said property is still in the possession of said Illinois Trust and Savings Bank as executor of and trustee under the last will and testament of said Joseph T. Torrence, deceased, which executor and trustee has a charge and trust in the legacies and property of said estate for distribution under said will.

Fourteenth. That by the said last will and testament property of the value of one thousand dollars passed to and for the use of Mrs. James H. Torrence, widow of James H. Torrence, who was a brother of said Joseph T. Torrence, deceased.

Fifteenth. That prior to and at the time of his death the said Joseph T. Torrence was the owner and seized in fee-simple of the following-described premises, situated in the county of Cook and State of Illinois:

Lots 13, 14, 15, and 16, in James H. Fisk's subdivision of lots 60 and 61, in Ellis' addition to Chicago, being a part of the southeast quarter of section thirty-four and fractional section thirty-five, township thirty-nine north, range fourteen east, of the third principal meridian, and that said premises were and still are of the clear market value of thirty thousand dollars (\$30,000).

That said deceased was also at said time the owner and seized in fee-simple of—

(a.) Lots one (1) and two (2), in block two (2), in Potter Palmer's Lake Shore addition to Chicago.

(b.) Lot described as the north sixteen (16) feet and eight (8) inches of that part lying east of the west one hundred and thirty (130) feet and west of the Lake Shore drive of lot twenty-one (21), in Collins' subdivision of the south half of block seven (7), in the Canal Trustees' subdivision of the south fractional half of section three (3), township thirty-nine (39) north, range fourteen east, of the third principal meridian.

(c.) The east fourteen (14) feet and ten (10) inches of the north sixteen (16) feet and eight (8) inches of the east seventy (70) feet of the west one hundred and thirty (130) feet of lot twenty-one (21), in Collins' subdivision of the south half of block seven (7) of Canal

Trustees' subdivision of south fractional half of section three (3), township thirty-nine (39) north, range fourteen (14) east, of the third principal meridian.

(d.) The south twenty (20) feet of the north thirty-six and two-thirds ($36\frac{2}{3}$) feet of that part of lot twenty-one (21), in the subdivision of the south half of block seven (7), in the Canal Trustees' subdivision of the south fractional half of section three (3), township thirty-nine (39) north, range fourteen east, of the third principal meridian,

lying east of the west one hundred and thirty (130) feet thereof and west of the Lake Shore drive.

That said premises described under "a," "b," "c," and "d" above comprised the homestead estate of said deceased, and are situate at the southwest corner of Bellvue place and the Lake Shore drive, in the city of Chicago, which premises were and still are of the clear market value of two hundred and twenty-five thousand dollars (\$225,000.)

That said deceased was also the owner and in possession of the goods and chattels within said premises, which goods and chattels were and are of the clear market value of one hundred and twenty-five thousand dollars (\$125,000.00), and that the said deceased was also seized and possessed at the time of his death of other personal property of the clear market value of two hundred and twenty-five thousand dollars, and that in and by his last will and testament the said Joseph T. Torrence, deceased, duly devised and bequeathed the aforesaid parcels of real estate, together with the goods and chattels thereon and therein situated and the said personal

8 property, to the said Illinois Trust and Savings Bank, as executor and trustee of his said last will and testament, subject to certain small legacies in said will set forth; to be held by said trustee for the use, benefit, and behoof of your orator upon certain charges and trusts in said last will and testament set forth. All of said estate, real and personal, so devised by deceased to said executor and trustee is still held and owned by the said defendant executor and trustee upon said uses, charges, and trusts.

Sixteenth. That said Daniel H. Kochersperger is county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, and claims as such that all the property which passed, as aforesaid, to and for the use of your orator and the said property which passed, as aforesaid, to and for the use of Mrs. James H. Torrence is all subject to a tax under an act of the legislature of the State of Illinois or statute of the State of Illinois entitled "An act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same," approved June 15, A. D. 1895, and claimed as such by said Daniel H. Kochersperger as such county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, to be in force on and since July 1, A. D. 1895.

That said Daniel H. Kochersperger, as such county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, claims that your orator as such beneficiary, devisee, and legatee and the said Illinois Trust and Savings Bank as executor and trustee under the last will and testament of said Joseph T. Torrence, deceased, are liable for a tax on said property which passed to and for the use of your orator, as aforesaid, under the said act or statute of the State of Illinois.

That said Daniel H. Kochersperger, as such county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, claims that the said Mrs. James H. Torrence, as such legatee, and said Illinois Trust and Savings Bank, as executor of and trustee under the last will and testament of said Joseph T. Torrence,

deceased, are liable under said act or statute of the State of Illinois for a tax upon said property which passed to and for the use of the said Mrs. James H. Torrence.

Seventeenth. That said Daniel H. Kochersperger, as such county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, claims that the amount of the alleged tax due under said act or statute from your orator and the said Illinois Trust and Savings Bank, as executor of and trustee under the last will and testament of said Joseph T. Torrence, deceased, upon the said property which passed to and for the use of your orator as aforesaid exceeds the sum of five thousand dollars (\$5,000), to wit, that it is the sum of six thousand dollars (\$6,000), and that the alleged tax due from said Mrs. James H. Torrence and the said Illinois Trust and Savings Bank, as executor of and trustee
10 under the last will and testament of said Joseph T. Torrence, deceased, upon the said property which passed to and for the use of said Mrs. James H. Torrence amounts to the sum of thirty dollars (\$30.00).

Eighteenth. That the said tax so alleged to be collectible under the said statute from the said estate has not been paid, and that said executor and trustee has up to the present time neglected to pay the same, and that the said Daniel H. Kochersperger, as county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, has duly demanded payment of said tax by and from said defendant, Illinois Trust and Savings Bank.

Nineteenth. And your orator further alleges that she has duly requested the defendant executor and trustee to omit and refuse to pay and to refrain from paying the said tax, and to contest the constitutionality of said act, and to refrain from paying the said tax voluntarily without protest, and to await the commencement of legal proceedings as in said statute provided, but that said defendant executor and trustee has refused and still refuses to comply with your orator's request, and has threatened and stated its intention of omitting to comply therewith, and has threatened and stated its intention and determination and is about to comply with all and singular the provisions of said act and statute and to pay said tax voluntarily without protest; that such payment of said alleged tax by said defendant executor and trustee in case the same
11 should be made voluntarily cannot be recovered if said law should be hereafter declared unconstitutional, and said payment would result in waste of said estate and a breach of trust on the part of said executor and trustee, and your orator would thereby suffer irreparable loss and injury.

Twentieth. That the tax under the said act or statute of the State of Illinois creates a lien upon each and every of the lots or parcels of real estate and upon all of said personal property so devised for the benefit of your orator, as aforesaid, and *coulds* the title thereto and makes the same unmarketable and depreciates the value thereof and prevents a sale of each and all of said parcels of real estate, to the great and irreparable damage and injury of your orator.

Twenty-first. That said act or statute if enforced, as fully appears

by reference thereto, will abridge the privileges and immunities of your orator as a citizen of the United States; that the enforcement of said act or statute will deprive your orator of her property without due process of law and will deny to your orator the equal protection of the laws; that said act or statute is unconstitutional, null, and void, because it is in conflict with and in violation of the provisions of the fourteenth article of amendment to the Constitution of the United States of America and other provisions of said Constitution.

Twenty-second. That said Daniel H. Kochersperger, county treasurer and *ex officio* county collector for the county of Cook, in the

12 State of Illinois, has been advised that your orator has requested the defendant executor and trustee to refrain from paying said tax voluntarily, and said defendant has been requested not to collect the same, but to cause to be instituted the proceedings contemplated and provided in said statute, but that said Daniel H. Kochersperger, county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, refuses to comply with your orator's request, and has declined to take or cause to be taken any legal proceedings under said act, and has stated that he would prefer that a suit to enjoin him from collecting the tax be forthwith instituted, to the end that in the public interest the legal point involved as to the constitutionality under the Constitution of the United States should be promptly adjudicated in this or some similar proceeding.

Twenty-third. That the said Daniel H. Kochersperger, as county treasurer and *ex officio* county collector for the county of Cook and State of Illinois, is not entitled to collect or receive and the said Illinois Trust and Savings Bank, as executor of and trustee under the last will and testament of said Joseph T. Torrence, deceased, should not pay any such tax upon or for the property which passed as aforesaid to and for the use of your orator, and that said Illinois Trust and Savings Bank, as executor of and trustee under the last will and testament of said Joseph T. Torrence, deceased, should be enjoined and restrained from voluntarily paying any such tax upon

13 or for the property which passed as aforesaid to and for the use of your orator, and said Daniel H. Kochersperger, county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, should be restrained by this honorable court from collecting or receiving any such tax upon or for the said property, and the cloud of said alleged tax lien on said premises should be removed therefrom by the order of this honorable court.

Twenty-fourth. Your orator further shows that this suit is not a collusive one to confer upon the circuit court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

Forasmuch, therefore, as your orator is without remedy in the premises except in a court of equity, and to the end, therefore, that the said Illinois Trust and Savings Bank, as executor of and trustee under the last will and testament of said Joseph T. Torrence, deceased, and Daniel H. Kochersperger, as county treasurer and *ex*

officio county collector for the county of Cook, in the State of Illinois, may fully answer this bill (but not under oath, the oath being waived); that a hearing hereof may be speedily had and a decree passed enjoining and restraining the said Illinois Trust and Savings Bank, as executor of and trustee under the last will and testament of said Joseph T. Torrence, deceased, from paying any such tax, and the said Daniel H. Kochersperger, as county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, from collecting or receiving said alleged tax under said act or statute upon or for the property which passed to and for the use of your orator, as aforesaid; that the cloud of said alleged tax lien on

14 such other, further, and different relief in the premises as equity may require and to your honors may seem meet—

May it please the court to grant the writ of summons in chancery, directed to the marshal of said district, commanding him to summon the said defendants to appear before this honorable court on the first day of the next term thereof, etc.

May it please the court also to grant the writ of injunction, directed to the said defendants, enjoining and restraining them respectively as aforesaid, and likewise enjoining and restraining them during the pendency of this action.

And your orator will ever pray, etc.

JESSE NORTON TORRENCE MAGOUN,
By PRUSSING & McCULLOCH, *Her Solicitors*.

(Endorsed :) Filed September 21, 1897. S. W. Burnham, clerk.

On the same day, to wit, the 21st day of September, 1897, there was filed in the clerk's office of said court Exhibits "A," "B," and "C" to the bill of complaint in said cause; which said Exhibits "A," "B," and "C" are respectively in the words and figures following, to wit:

15 EXHIBIT A.

I, Joseph T. Torrence, of # 88 Bellevue place, in the city of Chicago and State of Illinois, being in good bodily health and of sound and disposing mind and memory, do make, publish and declare this as and for my last will and testament, hereby revoking and annulling all other wills and codicils to wills heretofore made by me.

First.

I hereby appoint the Illinois Trust and Savings Bank executor of and trustee under this will.

Second.

I hereby direct that as soon as may be after my death all my just debts and funeral expenses be paid.

Third.

In addition to the financial assistance heretofore rendered them, I direct that there shall be paid to my brother Frank Torrence of Bement, Piatt county, Illinois, one thousand dollars (\$1,000.); to Mrs. James H. Torrence, widow of my late brother James H. Torrence, one thousand dollars (\$1,000.); to my sisters, Mrs. Elizabeth Gulleford, wife of William Gulleford of Millmine Station, Piatt county, Illinois, and Mrs. Eliza Gulleford, wife of Charles Gulleford of Warren, Trumbull county, Ohio, each one thousand dollars (\$1,000.), and to my nephew David Torrence of Latham, Logan county, Illinois, two hundred and fifty dollars. (\$250.00).

Fourth.

All the rest, residue and remainder of my estate, real personal and mixed of whatsoever kind and wheresoever situate
 16 whether now owned or hereafter acquired, of which I may die seized, possessed or entitled to in fee-simple, equity, expectancy or remainder, I hereby give, grant, devise and bequeath unto my said executor as trustee, to be paid to, received, held and disposed of by it, upon the following trusts and powers, to wit :

(1) To collect the income from the said residuary trust estate and to pay over to my daughter, Jesse Norton Torrence Magoun, until she shall have attained the age of thirty (30) years, so much of the net proceeds of said income which shall actually come into its hands (after paying the reasonable and proper costs of administering the trust) as she may desire, but not exceeding an average of forty thousand dollars (\$40,000.) per year, and to make such payments at such times and in such proportions in each year as she may request for her own use and behoof and upon her own receipt only, free and clear from any claim, demand or control of any husband she may have.

(2) Upon my daughter Jesse Norton Torrence Magoun arriving at the age of thirty (30) years, the principal of said residuary trust estate, together with any accretions thereto, shall — conveyed, transferred and delivered by my said trustee to her.

If my daughter, Jesse Norton Torrence Magoun shall die before reaching the age of thirty (30) years, the net income from said residuary trust estate or so much thereof as in the absolute discretion of my said trustee may be necessary for that purpose,
 17 shall be expended by or under the direction of said trustee, in the suitable maintenance, support and education of the child or children of my said daughter, Jesse Norton Torrence Magoun, until such child or the youngest surviving child, in case there have been more than one, shall have reached the full age of thirty (30) years, when the principal of said residuary trust estate, together with any accretions thereto shall be conveyed, transferred, and delivered by my said trustee, to such child or children, or to his, her or their surviving child or children *per stirpes* and not *per capita*.

(4) In case my said daughter, Jesse Norton Torrence Magoun shall die before reaching the age of thirty (30) years without leaving

a child or children surviving her, then it is my will and I hereby direct that the whole of said residuary trust estate including any and all accretions and additions thereto, shall forthwith vest and pass free, clear and discharged of and from any and all trust or other obligations of any kind or nature whatsoever, to my said brother and sisters and to the widow of my said brother, James H. Torrence, their surviving heirs in equal proportions, *per stirpes* and not *per capita*.

Fifth:

In the performance of its duties hereunder my executor and trustee is fully authorized and empowered in its absolute discretion to do and perform any and all acts and deeds, to execute, acknowledge and deliver any and all deeds, conveyances, leases, indentures, 18 agreements, contracts, undertakings, bonds, mortgages, discharges, receipts, acquittances, releases and any and all other documents, instruments and papers whatever, which may in its absolute discretion be considered to be necessary, proper or convenient to effectuate or carry into effect, the intent and purposes of this will, or any part thereof, or any business or transaction growing out of or connected therewith.

And it is hereby fully authorized and empowered in its absolute discretion to sell any or all of the property belonging to the estate, real, personal or mixed, at public or private sale, and to deliver and give good title to the same.

And in its respective capacities aforesaid, it is hereby specifically authorized and empowered in its absolute discretion to sell or exchange, and to deliver any and all real estate, and interest in real estate, and all certificates representing shares of stock, all stocks, bonds, notes and other securities, obligations or evidence of debt belonging to my general estate, or to said residuary trust estate, and to receive the price or proceeds thereof and in its absolute discretion from time to time to invest, change and reinvest the same.

The purpose of this article of this will, is to give to my said executor and trustee, in either or both said capacities as full and complete power and authority, in its absolute discretion in the performance of its respective duties hereunder, as I had over my property and estate when living.

19

Sixth.

In case of resignation, removal, disability or refusal to act of the Illinois Trust and Savings Bank, as executor and trustee of this will, any party in interest hereunder may apply to any court of competent jurisdiction for the appointment of a successor, executor or trustee, but it is my will that such vacancy shall be filled only by the appointment of a reputable and responsible trust company, authorized to accept and perform the duties hereinbefore prescribed for said executor and trustee.

In witness whereof I have hereunto set my hand and seal at the

city of Chicago, Illinois, this seventeenth day of February, A. D. 1896.

JOSEPH T. TORRENCE.

Signed, sealed, published, and declared as and for his last will and testament by the above-named testator, Joseph T. Torrence, in our presence, who, in his presence and in the presence of each other and at his request, have hereunto subscribed our names as attesting witnesses the day and year last above written.

MARSHALL LAPHAM.
JAMES J. REYNOLDS.
BERTHA DUPPLER.
FRED MATES.
THOMAS W. JOHNSTONE.
J. D. SPRINGER.

20

EXHIBIT B.

First Codicil.

The first subdivision of the fourth provision in the foregoing will is hereby modified and changed by adding at the end thereof the following, to wit:

But in case the net income for any year shall be insufficient to enable the payment of more than twenty thousand dollars (\$20,000.) for that year, to my said daughter, then and in that case the said trustee is hereby authorized and directed to sell sufficient of the property of the said residuary trust estate to enable the payment of and to pay my said daughter for that year, with the net income applicable thereto and aggregate amount of twenty-five thousand dollars.

In witness whereof, I have hereunto set my hand and seal at the city of Chicago, Illinois, this seventeenth day of February, A. D. 1896.

JOSEPH T. TORRENCE.

Signed, sealed and published, and declared as and for the first codicil to his last will and testament therein mentioned by the above-named testator, Joseph T. Torrence, in our presence, who, in his presence and in the presence of each other and at his request, have hereunto subscribed our names as attesting witnesses the day and year last above written.

MARSHALL LAPHAM.
JAMES J. REYNOLDS.
BERTHA DUPPLER.
FRED MATES.
THOMAS W. JOHNSTONE.
J. D. SPRINGER.

21

EXHIBIT C.

STATE OF ILLINOIS, }
 County of Cook, } ^{ss} :

The People of the State of Illinois to all to whom these presents shall come, Greeting :

Know ye that whereas Joseph T. Torrence, late of the county of Cook and State of Illinois, died on or about the 31st day of Oct., A. D. 1896, as it is said, after having duly made and published his last will and testament, a copy whereof is hereunto annexed, leaving at the time of his death property in this State which may be lost, destroyed, or diminished in value if speedy care be not taken of the same; and inasmuch as it appears that Illinois Trust and Savings Bank has been appointed executor in and by the said last will and testament to execute the same and to the end that the said property may be preserved for those who shall appear to have a legal right or interest therein, and that said will may be executed according to the request of the said testator, we do hereby authorize it, the said Illinois Trust & Savings Bank, as such executor, to collect and secure all and singular the goods and chattels, rights and credits, which were of the said Joseph T. Torrence at the time of his decease in whosoever hands or possession the same may be found in this State and well and truly to perform and fulfill all such duties as may be enjoined upon it by the said will so far as there shall be property and the law charge it, and in general to do

22 and perform all other acts which now or hereafter may be required of it by law.

Witness Abijah O. Cooper, clerk of the probate court of said county of Cook, and the seal of said court, this 5th day of [L. s.] Nov., A. D. 1896.

ABIJAH O. COOPER, *Clerk*.

(Endorsed :) Filed September 21, 1897. S. W. Burnham, clerk.

On the same day, to wit, the 21st day of September, 1897, came the Illinois Trust and Savings Bank, by its solicitors, and filed in the clerk's office of said court its answer to the bill of complaint; which said answer is in the words and figures following, to wit :

23

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } 88 :

In the Circuit Court of the United States of America for the Northern District of Illinois, Northern Division. In Chancery.

JESSIE NORTON TORRENCE MAGOUN

vs.

ILLINOIS TRUST AND SAVINGS BANK, as Executor and Trustee
 under the Last Will and Testament of Joseph T. Torrence, Deceased, and Daniel H. Kochersperger, as County Treasurer and
ex Officio County Collector of Cook County, in the State of
 Illinois. }

The answer of the Illinois Trust and Savings Bank, as executor and trustee under the last will and testament of Joseph T. Torrence, deceased, to said complainant's bill of complaint.

This defendant, for answer unto said bill of complaint, admits the allegations of fact therein contained in paragraphs first to twentieth, both inclusive, and paragraphs twenty-second and twenty-fourth.

Further answering, it says it does not know, and therefore cannot say, whether the allegations contained in paragraphs twenty-first and twenty-third of said bill of complaint are true or not, but
 24 it says that the same are allegations of law, and it submits the same to the decision of this Honorable court, and prays to be advised of its rights and duties in the premises as executor and trustee aforesaid and as an officer of this court.

And, having now fully answered, it prays to be hence dismissed with its costs, etc.

ILLINOIS TRUST AND SAVINGS BANK,

As Executor and Trustee under the Last Will and

Testament of Joseph T. Torrence, Deceased,

By JAMES C. HUTCHINS, *Its Solicitor.*

(Endorsed :) Filed September 21, 1897. S. W. Burnham, clerk.

On the same day, to wit, the 21st day of September, 1897, came Daniel H. Kochersperger, county treasurer and *ex officio* collector of the county of Cook, by his solicitors, and filed in the clerk's office of said court his answer to the bill of complaint in said entitled cause; which said answer is in the words and figures following, to wit:

25 UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } ss:

In the Circuit Court of the United States of America for the Northern District of Illinois, Northern Division. In Chancery.

JESSIE NORTON TORRENCE MAGOUN

vs.

THE ILLINOIS TRUST & SAVINGS BANK, as Executor and Trustee under the Last Will and Testament of Joseph T. Torrence, Deceased, and Daniel H. Kochersperger, as County Treasurer and *ex Officio* County Collector for the County of Cook, in the State of Illinois. }

The answer of Daniel H. Kochersperger, country treasurer and *ex officio* collector of the county of Cook, in the State of Illinois, defendant, to the bill of complaint of Jessie Norton Torrence Magoun.

This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto or to so much and such parts thereof as this defendant is advised it is or are material or necessary for him to make answer unto, answering, says:

26 This defendant admits that this is a suit in equity; that the amount in dispute, exclusive of interest and costs, exceeds the sum of \$5,000; that complainant is a citizen and resident of the State of New York, in the United States of America; that the defendant The Illinois Trust & Savings Bank, the executor and trustee under the last will and testament of Joseph T. Torrence, deceased, is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois; that the principal office and place of business of said Illinois Trust and Savings Bank is in the city of Chicago, county of Cook and State of Illinois; that this defendant, Daniel H. Kochersperger, the county treasurer and *ex officio* county collector of the county of Cook, in the State of Illinois, is a citizen of the State of Illinois, in the United States of America, and that his residence is in the city of Chicago, county of Cook, in the State of Illinois; that said Joseph T. Torrence was in his lifetime and up to the time of his death a citizen and resident of the county of Cook, in the State of Illinois, and that said Joseph T. Torrence on or about the 31st day of October, 1896, departed this life at Chicago, in the State of Illinois, leaving a last will and codicil thereto, both duly signed and attested, as in complainant's bill alleged; that in and by said will the said Joseph T. Torrence nominated and appointed said Illinois Trust and Savings Bank executor and trustee under said will; that said will and codicil thereto were both duly approved and admitted to record in the probate court of said Cook county, in the State of Illinois, on the 5th day of November, 1896, and that on the same day letters testamentary on

the said will and codicil were duly issued out of said probate court to said Illinois Trust & Savings Bank, and that said letters
27 testamentary still remain in full force and unrevoked; that said Illinois Trust & Savings Bank accepted the trust confided to and imposed upon it by said will and codicil and letters testamentary, and, is now the duly qualified and acting executor and trustee under said last will and testament, and has a charge in trust in the legacies or property for distribution under said will; that said estate is still pending unsettled and in process of administration in the said probate court of Cook county; that the complainant, Jessie Norton Torrence Magoun, is the daughter of said Joseph T. Torrence, deceased, and the beneficiary named in said will and in said codicil.

And this defendant, further answering, admits that said Joseph T. Torrence died seized and possessed of property which exceeded in value the sum of six hundred and twenty-five thousand dollars, \$625,000.00, all of which was at the time of his death and now is within the State of Illinois and all of which passed by said will and codicil; that said estate is solvent and exceeds in value the sum of six hundred thousand dollars (\$600,000) over and above all just claims and debts.

And this defendant, further answering, admits that the property which was of the said Joseph T. Torrence at the time of his death and was within the State of Illinois was of a clear market value of more than five hundred thousand dollars (\$500,000), and that the beneficial interest therein and the income therefrom passed by said will to and for the use of the complainant, a child of said Joseph

T. Torrence, deceased, and that said property is in the pos-
28 session of said Illinois Trust & Savings Bank, as executor and trustee under the last will and testament of said Joseph T. Torrence, deceased, which executor and trustee has a charge and trust in the legacies and property of said estate for distribution under said will, as in complainant's bill averred; that by said last will and testament property of the value of one thousand (\$1,000) dollars passed to and for the use of Mrs. James H. Torrence, widow of James H. Torrence, a brother of said Joseph T. Torrence, deceased.

And this defendant, further answering, says that he has never heard or been informed, save by the complainant's said bill, whether the said Joseph T. Torrence was the owner in fee-simple of the lands and premises situated in Cook county and State of Illinois, described and set out in paragraph 15 of said bill, but as to said lands, premises, and property this defendant believes that the said Joseph T. Torrence was at the time of his death the owner and seized of the said premises and property, and that the said premises and property are not of a less clear market value as in said bill alleged, and that by his last will and testament said Joseph T. Torrence duly devised and bequeathed the said parcels of real estate and the said personal property to the said Illinois Trust & Savings Bank, as executor and trustee of his said last will and testament, subject to certain small legacies in said will set forth to be held for the use,

benefit, and behoof of the complainant, upon certain charges and trusts in said last will set forth, and that all of said estate, real and personal, so devised to said executor and trustee is still held and owned by said executor and trustee upon and for said uses, charges, and trusts, as in said bill alleged.

29 And this defendant, further answering, admits that he, the said Daniel H. Kochersperger, is the county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, and claims as such that all the property which passed, as aforesaid, to and for the use of the complainant and the said property which passed, as aforesaid, to and for the use of Mrs. James H. Torrence is all subject to a tax according to the provisions and under an act of the legislature of the State of Illinois or statute of the State of Illinois entitled "An act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same, approved June 15, A. D. 1895," and that as such county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, he still claims and avers that the said statute of the State of Illinois entitled as aforesaid *to be* in force now and since July 1st, A. D. 1895.

And this defendant further admits that as such county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, he claims that the complainant as such beneficiary and legatee and the said Illinois Trust & Savings Bank as executor and trustee under the last will and testament of Joseph T. Torrence, deceased, are liable under said act or statute of the State of Illinois for a tax upon the right of succession of the said complainant to the said property which passed to and for the use of the complainant, as aforesaid, but denies that said act imposes a tax on said property

30 and avers the fact to be that said act imposes a tax upon the right of succession of the complainant to said property, and that Mrs. James H. Torrence as such legatee and the said Illinois Trust and Savings Bank as executor under said last will and testament of said Joseph T. Torrence, deceased, are liable for a tax upon the right of succession of said Mrs. James H. Torrence to said property which passed to or for her use under said act or statute of the State of Illinois, but denies that said act imposes a tax upon said property and avers the fact to be that said act imposes a tax upon the right of succession of Mrs. James H. Torrence to said property.

And this defendant further admits that as such county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, he claims that the amount of tax due under said act or statute from the complainant and the said Illinois Trust & Savings Bank, as executor and trustee, upon the right of succession to the said property which passed to and for the use of the complainant, exceeds the sum of five thousand (\$5,000) dollars, and that he believes it is the sum of six thousand (\$6,000) dollars, and that the said tax due from Mrs. James H. Torrence and the said Illinois Trust and Savings Bank, as executor and trustee, upon the right of succession to the said property which passed to and for the use of Mrs. James H.

Torrence, amounts to the sum of thirty (\$30.00) dollars, but denies that five or six thousand (\$5,000 or \$6,000) dollars in complainant's bill alleged is a tax upon the property which passed to the complainant, and denies that the sum of thirty (\$30.00) dollars
31 in complainant's bill alleged is a tax upon the property which passed to and for the use of Mrs. James H. Torrence, but avers that the said tax is a tax upon the right of succession of the said parties respectively and not upon the property.

And this defendant, further answering, admits that the said tax is collectable under the said statute from the said estate, has not been paid, and that the said executor and trustee has up to the present time neglected to pay the same, and that he, this defendant, as county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, has duly demanded payment of said tax by and from the said Illinois Trust & Savings Bank.

And this defendant, further answering, says that he is not informed, save by the complainant's bill, whether the complainant has requested the defendant The Illinois Trust & Savings Bank, executor and trustee, to omit and to refuse to pay and refrain from paying the said tax, and to contest the constitutionality of said act and to refrain from paying said tax voluntarily without protest, and to await the commencement of legal proceedings as in said bill provided, but this defendant believes that the complainant has so requested the defendant The Illinois Trust & Savings Bank, as in said bill is alleged.

And this defendant admits that the said Illinois Trust & Savings Bank, executor and trustee, is about to comply with all and singular the provisions of said act and statute of the State of Illinois, and to pay said tax voluntarily, without protest, but this defendant denies that said payment so made by said executor and trustee would result in the waste of said estate and a breach of trust on the part of said trustee, and denies that thereby the com-
32 plainant would suffer irreparable loss and injury.

And this defendant, further answering, admits that the tax under the said act or statute of the State of Illinois creates a lien upon each and every of the lands or parcels of real estate and upon all said personal property so devised for the benefit of the complainant as aforesaid, but this defendant denies that the said tax depreciates the value thereof, and denies that it prevents the sale of each and all of said parcels of real estate, to the great and irreparable damage and injury of the complainant.

And this defendant, further answering, denies that the said act or statute if enforced will abridge the privileges and immunities of the complainant as a citizen of the United States, and denies that the enforcement of said act or statute will deprive the complainant of her property without due process of law, and denies that the enforcement of said act or statute will deprive the complainant of the equal protection of the laws.

And this defendant denies that the said act or statute is in conflict with and in violation of the 14th amendment to the Constitution of the United States of America or any other of the provisions of said Constitution.

And this defendant, further answering, denies that the said act or statute of the State of Illinois entitled "An act to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same, approved June 15, A. D. 1895," is unconstitutional, null,

and void because of any of the reasons in complainant's bill set out or because of any other reason whatever, but alleges the contrary to be true, and avers that the said act or statute is a valid and constitutional law or statute of the State of Illinois, and that as such valid statute it should and ought to be enforced.

This defendant, further answering, denies that as such county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, he is not entitled to collect and receive, and that said Illinois Trust & Savings Bank, as executor and trustee under the last will and testament of said Joseph T. Torrence, deceased, should not pay, any such tax upon or for the property which passed as aforesaid to and for the use of complainant, but alleges the contrary to be true, and avers that as county treasurer and *ex officio* county collector of said county of Cook, in the State of Illinois, — is entitled to collect and receive, and that the said Illinois Trust & Savings Bank, as executor and trustee under the last will and testament of said Joseph T. Torrence, deceased, should pay, said tax under and according to the provisions of said act or statute of the State of Illinois upon the right of succession to the property which passed to and for the use of the complainant, as in said complainant's bill alleged, and this defendant denies that the said Illinois Trust & Savings Bank, as such executor and trustee, should be enjoined and restrained from voluntarily paying the said tax, and denies that the said Daniel H. Kochersperger, county treasurer and *ex officio* county collector of the county of Cook, in the State of Illinois, should be restrained from collecting or receiving said tax.

34 And this defendant denies that said tax lien upon said premises is a cloud upon the complainant's title, but avers that the same is a valid and subsisting lien.

And this defendant, further answering, denies that the complainant is entitled to the relief or any part thereof in said bill of complaint demanded, and prays the same advantage of this answer as though he had pleaded or demurred to said bill, and prays to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

DANIEL H. KOCHERSPERGER,
County Treasurer and ex Officio County Collector
of Cook County,

By ROBERT S. ILES &
FRANK L. SHEPARD,
His Solicitors.

ROBERT S. ILES,
County Attorney,
FRANK L. SHEPARD,
Ass't County Attorney, Solicitors for said Defendant.
EDWARD C. AKIN,
Attorney General State of Illinois, of Counsel.

(Endorsed :) Filed September 21, 1897. S. W. Burnham, clerk.

35 And on the same day, to wit, the twenty-first day of September, in the July term of said court, 1897, in the record of proceedings thereof in said entitled cause, before the Hon. John W. Showalter, circuit judge, appears the following entry, to wit :

Entry.

JESSIE NORTON TORRENCE MAGOUN

vs.

ILLINOIS TRUST AND SAVINGS BANK, as Executors and Trustees under the Last Will and Testament of Joseph T. Torrence, Deceased, and Daniel H. Kochersperger, as County Treasurer and <i>ex Officio</i> County Collector of the County of Cook, in the State of Illinois.	}	24631.
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Now, on this day, come the parties, by their solicitors, and by agreement this cause is set down for hearing on bill and answer, and the court, having fully considered the same and being now fully advised, finds that said bill should be dismissed for want of equity. It is thereupon ordered, adjudged, and decreed that said bill be, and the same is hereby, dismissed for want of equity at the costs of the complainant, and that execution issue therefor.

And now comes the complainant, by her solicitors, and files her petition for appeal to the Supreme Court of the United States, together with her assignment or errors, as required by the rules of said Supreme Court. It is thereupon ordered that said appeal be allowed upon the complainant entering into bond in the sum of five hundred dollars (\$500), with security to be approved by the court; and thereupon the complainant presents her bond to the court in the penalty of five hundred dollars, conditioned as the law directs; which bond is now approved by the court and ordered to be filed.

36 And on the twenty-first day of September, 1897, came the complainant in said entitled cause, by her solicitors, and filed in the clerk's office of said court her petition for appeal and assignment of errors; which said petition and assignment of errors are in words and figures following, to wit :

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the Circuit Court of the United States of America for the Northern
 District of Illinois, Northern Division. In Chancery.

JESSIE NORTON TORRENCE MAGOUN

vs.

ILLINOIS TRUST AND SAVINGS BANK, as Executor
 and Trustee under the Last Will and Testament
 of Joseph T. Torrence, Deceased, and Daniel H.
 Kochersperger, as County Treasurer and *ex Officio*
 County Collector of the County of Cook, in the
 State of Illinois. } Gen'l No., —.
 Term No., —.

Petition for Appeal and Assignment of Errors.

The complainant, Jessie Norton Torrence Magoun, prays an appeal to the Supreme Court of the United States from the decree and order of his honor Judge Showalter, dismissing the bill of complaint herein for want of equity, entered the twenty-first day of September, A. D. 1897, and assigns the following reasons for appeal:

37 First. That the court erred in dismissing the said bill of complaint.

Second. That the court erred in holding that the act of the legislature of the State of Illinois entitled "An act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same" is valid.

Third. That the court erred in not deciding that the State of Illinois by the said act or statute deprived the complainant of property without due process of law.

Fourth. That the court erred in deciding that the said act or statute affords the equal protection of the laws to persons within the jurisdiction of the State of Illinois.

Fifth. That the court erred in deciding that the State of Illinois by the said act or statute has not denied and does not deny to persons within its jurisdiction the equal protection of the laws.

Sixth. That the court erred in not deciding that the said act or statute deprives the complainant of property without due process of law.

Seventh. That the court erred in not deciding that the said act or statute denies to complainant, who is a citizen of the United States, the equal protection of the laws.

38 Eighth. That the court erred in not deciding that the said act or statute abridges the privileges of complainant, who is a citizen of the United States and of New York.

Ninth. That the court erred in not deciding that the said act or statute abridges the immunities of the complainant, who is a citizen of the United States and of New York.

Tenth. That the court erred in not deciding that the said act or statute is repugnant to, in conflict with, and in violation of the provisions of the fourteenth article of amendment- to the Constitution of the United States of America.

Eleventh. That the court erred in not granting the relief prayed for in the said bill of complaint.

Twelfth. That the court erred in not deciding that the said act or statute is repugnant to, in conflict with, and in violation of other provisions of the Constitution of the United States of America.

Thirteenth. That the court erred in that said decree dismissing the said bill of complaint for want of equity is contrary to law and said decree is repugnant to, in conflict with, and in violation of the provisions of the Constitution of the United States of America.

JESSIE NORTON TORRENCE MAGOUN,
By PRUSSING & McCULLOCH, *Her Solicitors*.

(Endorsed :) Filed September 21, 1897. S. W. Burnham, clerk.

39 Know all men by these presents that we, Jessie Norton Torrence Magoun, as principal, and Eugene E. Prussing, as sureties, are held and firmly bound unto Illinois Trust and Savings Bank, as executor and trustee under the last will and testament of Joseph T. Torrence, deceased, and Daniel H. Kochersperger, as county treasurer and *ex officio* county collector of Cook county, Illinois, in the full and just sum of five hundred dollars, to be paid to the said bank and Kochersperger, their successors and certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of September, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a term of the circuit court of the United States in & for the northern district of Illinois, northern division, in a suit depending in said court between said Jessie Norton Torrence Magoun, as complainant, and said bank and Kochersperger, as defendants, a decree was rendered against the said Magoun, and the said Magoun having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said bank and Kochersperger, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Magoun shall prosecute said appeal to effect and answer all damages

and costs if she fail to make her plea good, then the obligation to be void; else to remain in full force and virtue.

JESSIE NORTON TORRENCE MAGOUN, [SEAL.]
By EUGENE E. PRUSSING, *Her Att'y-in-fact.* [SEAL.]
EUGENE E. PRUSSING. [SEAL.]

Sealed and delivered in presence of—
GEO. W. KEMP, *Witness.*

Approved by—
H. JOHN W. SHOWALTER,
Circuit Judge.

(Endorsed :) Filed Sept. 21, 1897. S. W. Burnham, clerk.

40 *Clerk's Certificate.*

NORTHERN DISTRICT OF ILLINOIS, } ss:
Northern Division, }

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein Jessie Norton Torrence Magoun is the complainant and The Illinois Trust and Savings Bank, as executor and trustee under the last will and testament of Joseph T. Torrence, deceased, and Daniel H. Kochersperger, as county treasurer and *ex officio* county collector for the county of Cook, in the State of Illinois, are the defendants, as the same appear from the original records and files of said court now remaining in my custody and control.

Seal of Circuit Court
U. S., Northern Dist.
Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 22nd day of September, 1897.

S. W. BURNHAM, *Clerk.*

41 UNITED STATES OF AMERICA, ss:

To Illinois Trust and Savings Bank, as executor and trustee under the last will and testament of Joseph T. Torrence, deceased, and Daniel H. Kochersperger, as county treasurer and *ex officio* county collector of the county of Cook, Illinois, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an appeal — of the United States circuit court of the northern district of Illinois, wherein Jessie Norton Torrence Magoun is appellant and you are appellee — and you are defendant in error, to show cause, if any there be, why the decree rendered against the said appellant, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John W. Showalter, circuit judge, this twenty-first day of September, in the year of our Lord one thousand eight hundred and ninety-seven.

JOHN W. SHOWALTER,
Circuit Judge.

42 The undersigned hereby accept service of the within citation and the delivery of a true copy thereof.

JAMES C. HUTCHINS,
*Sol'r for Illinois Trust & Savings Bank, as Ex'r & Trustee
under the Last Will & Testament of Jos. T. Torrence, Dec'd.*

DANIEL H. KOCHERSPERGER,
*County Treasurer & ex Officio County Collector
of Cook County, State of Illinois,*

By ROBERT S. ILES, *His Solicitor.*

Sep. 21, '97.

Endorsed on cover: Case No. 16,677. N. Illinois C. C. U. S. Term No., 464. Jessie Norton Torrence Magoun, appellant, vs. Illinois Trust and Savings Bank, as executor and trustee under the last will and testament of Joseph T. Torrence, deceased, and Daniel H. Kochersperger, as county treasurer and *ex officio* county collector of the county of Cook, Illinois. Filed September 25, 1897.

No. 425, 463 and 464.

OCT 12 1897

JAMES H. MCKENNEY,

CLERK

Inheritance Tax Cases.

Motion to Advance.

Filed Oct. 12, 1897.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

Josephine C. Drake, et al.,
Plaintiffs in Error,
vs.

No. 425.

Daniel H. Kochersperger, County Treasurer and County Collector of Cook County, Illinois,
Defendant in Error.

Error to the Supreme Court of the State of Illinois.

Elizabeth Emerson Sawyer, et al.,
Plaintiffs in Error,
vs.

No. 463.

Same,
Defendant in Error.

Error to the Circuit Court for the Northern District of Illinois.

Jessie Norton Torrence Magoun,
Appellant,
vs.

No. 464.

Illinois Trust and Savings Bank, et al.,
Appellees.

Appeal from the Circuit Court for the Northern District of Illinois.

MOTION TO ADVANCE.

ROBERT S. ILES,
County Attorney for Cook County, Illinois.

FRANK L. SHEPARD,
Assistant County Attorney, Cook County, Illinois.
Attorneys for Defendants in Error and Appellees.

EDWARD C. AKIN,
Attorney General, State of Illinois.
Of Counsel.

IN THE
Supreme Court of the United States
OCTOBER TERM, A. D. 1897.

Josephine C. Drake, et al., <i>Plaintiffs in Error,</i> <i>vs.</i>	}	No. 425. Error to the Supreme Court of the State of Illinois.
Daniel H. Kochersperger, County Treas- urer and County Collector of Cook County, Illinois, <i>Defendant in Error.</i>		
Elizabeth Emerson Sawyer, et al., <i>Plaintiffs in Error,</i> <i>vs.</i>	}	No. 463. Error to the Circuit Court for the North- ern District of Illi- nois.
Same, <i>Defendant in Error.</i>		
Jessie Norton Torrence Magoun, <i>Appellant,</i> <i>vs.</i>	}	No. 464. Appeal from the Cir- cuit Court for the Northern District of Illinois.
Illinois Trust and Savings Bank, et al., <i>Appellees.</i>		

MOTION TO ADVANCE ABOVE ENTITLED CASES
UNDER RULE 26.

TO THE HONORABLE, THE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES :

The Attorney General of the State of Illinois and the
County Attorney for Cook County, Illinois, move that the
above entitled cases may be advanced for argument and
respectfully submit the following reasons why the motion
should be granted, viz :

I.

The question involved in these cases is the constitutionality of a statute of the State of Illinois, entitled "An Act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same", approved June 15, 1895.

The tax imposed is a graduated duty upon the right of inheritance, and varies from one to six per cent. according to the valuation of the estates passing from deceased persons to beneficiaries by will or under the intestate laws of the state, and according to the relationship of the beneficiaries to the deceased, with exemptions varying from \$500 to \$20,000.

The plaintiffs in error and appellant in these cases contend that this statute is invalid on the ground that its provisions conflict with the Fourteenth Article of Amendment to the Constitution of the United States. The particular points relied upon seem to be that the duty deprives citizens of property without due process of law; that the exemptions and the classification for taxation are arbitrary and without reference to a common ratio, and that a graduated duty varying according to amount of property is a denial of the equal protection of the laws.

II.

In the first case, *Drake v. Kochersperger*, No. 425, the Supreme Court of the State of Illinois held the statute valid; but the writ of error from this court has stayed the execution of the judgment. The pendency of that writ and the proceedings in the other cases have tended to

create difficulties and delay in the collection of the tax and to occasion a multiplicity of suits. The State of Illinois expected to collect not less than \$500,000. per annum under this statute. The statute was enacted in 1895, and this litigation has already delayed its enforcement for more than two years, with a possibility of more than one years' further delay in this court, if these cases take their regular turn upon the docket.

III.

The questions arising in these cases under the Fourteenth Amendment cannot be authoritatively decided except by this court. Uncertainty and pending litigation as to the constitutionality of the statute imposing this duty must necessarily lead to numerous suits which will embarrass and hinder the enforcement of the law and the collection of the tax.

The administration of the tax laws of the State of Illinois will be greatly aided by the prompt and authoritative decision by this court of so grave a question as the constitutionality of the law which has thus been challenged.

IV.

The undersigned submit that these cases involve matters of sufficient general public interest to justify the granting of this motion.

They therefore pray that the cases be advanced upon the docket and heard at as early a day as may be convenient to the court.

Notice of this motion has been served on counsel for

the plaintiffs in error and appellant, respectively, and proof of service filed with the clerk of this court.

WASHINGTON, October 12, 1897.

Respectfully submitted.

ROBERT S. ILES,

County Attorney for Cook County, Illinois.

FRANK L. SHEPARD,

Assistant County Attorney, Cook County, Illinois.

Attorneys for Defendants in error and Appelles.

EDWARD C. AKIN,

Attorney General, State of Illinois.

Of Counsel.

nos 425, 463 and 464.

FILED
DEC 21 1897
JAMES H. MCKENNEY,
CLERK

ILLINOIS INHERITANCE TAX CASES.

Brief of Harrison, Guthrie & Prussing

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

for P. C. & Appeal.

Nos. 425, 463, 464.

Filed Dec. 21, 1897.

JOSEPHINE C. DRAKE *et al.*, Executors, &c.,

Plaintiffs in error,

vs.

DANIEL H. KOCHERSPERGER, County Treasurer, &c., of
Cook County, Illinois.

Error to the Supreme Court of the State of Illinois.

ELIZABETH EMERSON SAWYER *et al.*, Executors, &c.,

Plaintiffs in error,

vs.

THE SAME.

Error to the Circuit Court of the United States for the
Northern District of Illinois.

JESSIE NORTON TORRENCE MAGOUN,

Appellant,

vs.

ILLINOIS TRUST AND SAVINGS BANK, as Executor, &c.,
of JOSEPH T. TORRENCE, deceased, and DANIEL H.
KOCHERSPERGER, County Treasurer, &c.

Appeal from the Circuit Court of the United States for
the Northern District of Illinois.

**Brief of argument on behalf of plaintiffs in error and appellant
in support of contention that the Illinois Inheritance Tax
Law is in conflict with the provisions of the Fourteenth
Amendment.**

BENJAMIN HARRISON,
WILLIAM D. GUTHRIE,
EUGENE E. PRUSSING,

Of counsel for plaintiffs in error and appellant.

BLEED THROUGH

POOR COPY

ILLINOIS INHERITANCE TAX CASES.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897. Nos. 425, 463, 464.

JOSEPHINE C. DRAKE *et al.*, Executors, &c.,
Plaintiffs in error,
vs.

DANIEL H. KOCHERSPERGER, County Treasurer, &c., of
Cook County, Illinois.

Error to the Supreme Court of the State of Illinois.

ELIZABETH EMERSON SAWYER *et al.*, Executors, &c.,
Plaintiffs in error,
vs.

THE SAME.

Error to the Circuit Court of the United States for the
Northern District of Illinois.

JESSIE NORTON TORRENCE MAGOUN,
Appellant,
vs.

ILLINOIS TRUST AND SAVINGS BANK, as Executor, &c.,
of JOSEPH T. TORRENCE, deceased, and DANIEL H.
KOCHERSPERGER, County Treasurer, &c.

Appeal from the Circuit Court of the United States for
the Northern District of Illinois.

BRIEF OF ARGUMENT ON BEHALF OF PLAINTIFFS IN
ERROR AND APPELLANT IN SUPPORT OF CONTENTION THAT
THE ILLINOIS INHERITANCE TAX LAW IS IN CONFLICT

WITH THE PROVISIONS OF THE FOURTEENTH AMENDMENT.

I.

THE ISSUES PRESENTED BY THE PLEADINGS IN THESE CASES.

The three cases involve the same question as to the constitutionality, under the fourteenth amendment, of an act of the Illinois Legislature, commonly called the Inheritance Tax Law, in force July 1, 1895.

The first case, *Drake v. Kochersperger*, was begun by a petition filed by the defendant in error D. H. Kochersperger, County Treasurer and *ex officio* County Collector of Cook County, Illinois, against the executor of the last will of John D. Drake, deceased, in the County Court of Cook County, to ascertain and collect the tax imposed on the Drake estate by the statute in question. The executors filed a special and general demurrer to the petition, alleging the unconstitutionality of the act under the constitution of Illinois, and

"That said alleged act of the legislature of the State of Illinois is void because it is in conflict with and in violation of the provisions of the Constitution of the United States of America." (Drake record, p. 3.)

The demurrer was sustained by the county court and the petition dismissed. The county treasurer thereupon appealed to the Supreme Court of Illinois, which reversed the judgment of the county court and sustained the constitutionality of the law (see opinion, Drake record, p. 8). The question under the Constitution of the United States, thus specially set up in the court of original jurisdiction by

the executors, was also presented in their behalf on the argument on the appeal below. The writ of error from this Court, allowed by the Chief Justice of the Supreme Court of Illinois, so certifies (Drake record, p. 21). The executors having succeeded in the county court and being therefore respondents in the Supreme Court of Illinois, there was no other way in which the question under the Federal Constitution could be there set up.

The second case, *Sawyer v. Kochersperger*, was brought by the county treasurer in the county court against the executors, trustees, devisees and legatees of Charles B. Sawyer, deceased, and was removed to the Circuit Court of the United States in and for the Northern District of Illinois. The petition alleges the liability of the estate and of the defendants to the tax under the Inheritance Tax Law, the appointment of an appraiser and the appraisement of the estate, the assessment of the tax in detail upon each devise and legacy (the total sum being \$6,970), the lapse of sixty days since such assessment whereby the tax became immediately payable, the demand upon and failure and refusal of the defendants to pay on the specific ground that the act imposing the tax was in conflict with the provisions of the fourteenth article of amendment to the Constitution of the United States. (Sawyer record, p. 7, fol. 11.) The petition for removal was based upon the fact "that the petition in said cause shows that the above-entitled action is a controversy arising under the Constitution of the United States and under the fourteenth article of amendment to said Constitution of the United States of America." (Sawyer record, p. 28, fol. 45.) The answer of the defendants filed in the Circuit

Court of the United States admits the allegations of the petition so far as the proceedings taken to ascertain and assess the tax are concerned, but denies the validity of the law. It raises the same questions under the Constitution of the United States alleged in the petition for removal, and further amplifies the statement of them. (Sawyer record, p. 35, fol. 56.) The cause was heard upon petition and answer and a judgment entered in favor of the petitioner as prayed, for \$6,970, which the executors were to pay "for the account of the various co-defendants interested in said estate in the proportion and in the manner following—[here follows the specification of each legacy or devise and the tax thereon]." (Sawyer record, pp. 36-38.) The petition for writ of error and assignment of errors raise the same questions as the answer (Sawyer record, p. 39).

The third case, *Magoun v. Illinois Trust and Savings Bank, et al.*, was a bill in chancery filed in the Circuit Court of the United States in and for the Northern District of Illinois, by Jesse Norton Torrence Magoun, a resident and citizen of New York, against the trust company, as executor of and trustee under the last will and testament of Joseph T. Torrence, deceased, and the county treasurer of Cook County, Illinois, both residents and citizens of Illinois (Magoun record, pp. 1-5), to remove a cloud from the real estate devised by said decedent to the complainant and to enjoin the first named defendant from voluntarily paying and the county treasurer from collecting or receiving the inheritance tax, amounting to more than \$5,000, alleged to be due upon the entire estate of said decedent and for which the complainant's interest in said estate was contended by the county treasurer to be liable. The

bill sets forth the will of the decedent, a description and valuation of the real estate and personal property left by him, amounting in all to \$600,000 above his debts, and the demand of the county treasurer for the inheritance tax which by the act in question is made a lien on all of said property, the request of the complainant to the defendant trust company not to pay the same, to contest the constitutionality of the act, to refrain from paying the same voluntarily and without protest, and to await the commencement of legal proceedings to enforce the same, the refusal of the trust company to comply with this request, and its threat and intention to pay said tax at once voluntarily, which payment could not be recovered if said law should hereafter be declared unconstitutional. The bill also alleges that such payment would result in waste of the estate and would be a breach of trust on the part of said executor, to the irreparable loss and injury of the complainant; that the alleged lien of the tax clouds the title to the real property and renders the same unmarketable, and that the act is in conflict with the provisions of the fourteenth amendment. The trust company answered, admitting the allegations of fact in the bill, but submitting the question of the constitutionality of the law to the court and praying to be advised of its rights and duties in the premises as executor and trustee aforesaid and as an officer of the court (Magoun record, p. 12). The county treasurer denied that the act was unconstitutional, and admitted the allegations respecting the estate of the deceased, the interest of the complainant therein, the lien of the inheritance tax thereon and the claim and demand made therefor (Magoun record, pp. 13-17). The cause was heard on bill and answers and a decree was entered dis-

missing the bill (Magoun record, p. 18), from which an appeal was prayed to this Court and allowed. The assignment of errors is substantially the same as in the Drake and Sawyer cases. (*Pollock v. Farmers Loan and Trust Co.*, 157 U. S., 429, 554 ; *Dodge v. Woolsey*, 18 How., 331, 341, 345.)

II.

THE PROVISIONS OF THE ILLINOIS INHERITANCE TAX LAW.

The law is entitled " An act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same," approved June 15, 1895, in force July 1, 1895, and is to be found on page 301 of the laws of Illinois for 1895, and also in Starr and Curtis's Statutes (1896) Vol. 3, p. 3528. A copy of the act is printed as an appendix to this brief.

Section 1 of the act provides that the beneficial interest to any property or the income therefrom which shall pass by will or descent or transfer, deed, grant, sale or gift made in contemplation of death, to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son or the husband of the daughter, or any child or children adopted, or any lineal descendant born in lawful wedlock, shall be taxed one dollar on every hundred dollars of the clear market value of the property *received by each person*, and at the same rate for every less amount, provided that any estate, which may be valued at a less sum than \$20,000, shall not be subject to any such duty or tax, and that the tax is to be levied in the above cases only upon the excess of \$20,000 received by each person, thus exempting all estates and legacies of \$20,000 or less. When the beneficial interest to any property or the in-

come therefrom shall pass to or for the use of any uncle, aunt, niece, nephew or any lineal descendant of the same, the rate of tax is fixed at two dollars on every hundred dollars in excess of \$2,000 received by each person. In all other cases, the tax is upon the *estate* and not the amount received by each person, and the tax is classified as follows: On each and every hundred dollars of the clear market value of all property, and at the same rate for any less amount, on all estates of ten thousand dollars and less—three dollars; on all estates over ten thousand dollars and not exceeding twenty thousand dollars—four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars—five dollars; and on all estates over fifty thousand dollars—six dollars. There is an exemption in all such cases of estates valued at a less sum than five hundred dollars.

Section 2 provides that estates for life or for a term of years, bequeathed or devised to mother, father, husband, wife, brother and sister, the widow of the son, or a lineal descendant, shall not be taxed, but that a tax shall be levied only on the value of the remainder of the estate, and shall be payable with interest at the expiration of the estate of the first taker, thus exempting life estates and estates for years, no matter how valuable, from all taxes under the act. The remainder of the act consists of provisions for the machinery necessary to levy and collect the tax, through the medium of an appraiser to be appointed by the county court upon the application of the county treasurer, etc.

The question presented in these cases is not as to the validity of taxes upon successions. The power to impose an inheritance tax in a proper manner and accord-

ing to some rule of equality need not be challenged for the purposes of this argument.

The point of constitutional law to be decided is whether or not, under the fourteenth amendment, the states can levy graduated or progressive taxes upon persons, property or privileges arbitrarily classified solely according to the amount or value of the property or privilege taxed, and whether or not exemptions of legacies as large as twenty thousand dollars and of estates for life and years, no matter how large or valuable, can be sustained.

The opinion of the Supreme Court of Illinois in the Drake case holds that the law in question levies a tax upon the right or privilege of succession, and that the classification provided in the act is within the legislative power and discretion. In its opinion, the court said (Drake record, p. 10) :

"By this act of the legislature *six classes of property are created heretofore absolutely unknown*. It is those classes of property depending upon the estate owned by one dying possessed thereof which the State may regulate as to its descent and the right to devise. * * No person inherits property or can take by devise except by the statute; and the State, having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown."

The interpretation by the Supreme Court of Illinois is, therefore, that by this statute "six classes of property are created heretofore absolutely unknown," namely, "classes of property depending upon the estate owned by one dying possessed thereof." In the case of next of kin, the tax is levied upon the amount "received by each person." In all other cases, the class and the tax depend, as the court held, "upon the estate owned by one dying possessed thereof." The court also declared that the amount levied "is

not a tax on the estate, but on the right of succession " (Drake record, fol. 14).

There are, therefore, two different and distinct systems or principles applied in the Illinois act: the one basing the tax on the amount received or the value of the privilege of succession; the other basing the tax upon the estate owned by the decedent irrespective of the amount or value of the legacy.

Taking for example the first class of legacies to children, etc., there is no graduation or progression of the tax other than such as may result from the exemptions of estates for life or for years and \$20,000. These exemptions of themselves produce the grossest inequality. The estate of the decedent may consist of several hundred thousand dollars, but there is absolutely no tax if it be divided into legacies of \$20,000. An estate of \$100,000 divided among five direct heirs pays no tax. The provision frees from the burden of the tax more than ninety per cent. of the property of the state. Practical experience has shown that estates in most instances will be so divided in order to defeat the tax, and that this exemption will therefore attain enormous proportions. An amendment of the collateral inheritance tax law in New York was for this reason found necessary.¹ The main policy of the Illinois act is clearly to force redistribution of property and wealth and not to provide revenue.

But if we take the instances of the third class, applying to all grantees, devisees or legatees other than near relatives, we find that the tax depends upon the amount of the *estate*, irrespective of the amount or share received by each person.

In order to show the scope and operation of

¹ *Matter of Hoffman*, 143 N. Y., 327, 330.

the act, let us suppose two estates: one estate of \$10,000 passing to one legatee and another estate of \$60,000 passing to six legatees receiving \$10,000 each. In each instance, the recipient inherits or receives \$10,000; that is the extent or value to him of the privilege or right of succession. In the one case, the legatee pays a tax of three per cent. or \$300; in the other, he pays a tax of \$600 *on receiving exactly the same legacy, exercising exactly the same privilege or right of succession, under exactly similar circumstances.* Or let us assume that A. is entitled to a legacy of \$5,000 out of an estate of \$10,000 and that B. is entitled to \$5,000 out of an estate of \$10,001. A. pays \$150, but B. pays \$200 for the right to receive exactly the same sum, in other words, for exercising the identical privilege or right of succession.

Thus, A. is entitled to \$10,000, on which the tax is \$300. B. is entitled to \$10,001, on which the tax is \$400.04. B. is therefore mulcted in \$100.04 more than A. because he has been bequeathed a dollar more. C. is entitled to \$20,000, on which the tax is \$800. D. is entitled to \$20,001, on which the tax is \$1,000.05. D. is mulcted in \$200.05 more than C. because he is bequeathed a dollar more. E. is entitled to \$50,000, on which the tax is \$2,500. F. is entitled to \$50,001, on which the tax is \$3,000.06. F. is mulcted in \$500.06 more than E. because he is bequeathed a dollar more.

The progression is likewise unnecessarily arbitrary if we take the view that the tax is levied on the amount received, which is not the correct interpretation of the statute, as the Illinois Supreme Court has declared. Under such an assumption, those taking the larger amounts are required to pay a larger rate on the same sums upon which those taking smaller sums pay a smaller rate; that is to say, one who receives

a legacy of \$10,000 pays 3 per cent., or \$300, thus receiving \$9,700 net; while one receiving a legacy of \$10,001 pays 4 per cent. on the whole amount, or \$400.04, thus receiving \$9,600.96, or \$99.04 less than the one whose legacy was actually one dollar less valuable. This method is applied throughout the class. Other examples might be stated.

These are, it is true, extreme cases; but they differ only in degree from the many unjust and unnecessary discriminations which must follow the enforcement of this act. If progressive taxes are to be sanctioned, let us at least have reasonably fair provisions.

In characterizing this arbitrary feature, Judge Carter, in his opinion in the county court, said (*Chicago Legal News*, November 28, 1896):¹

"If this portion of the law that I am now discussing had been worded so that all beneficiaries should be taxed three per cent. on the first \$10,000 that they received, four per cent. on the next \$10,000, five per cent. on the next \$30,000, and six per cent. on all in excess of that amount, I should feel strongly inclined to hold that the law was constitutional, even in the face of the Minnesota and Ohio decisions just referred to, and certainly a law drawn on reasonable lines graduating the taxes in proportion to the amount of property received by the beneficiaries, must be held constitutional, if the \$20,000 exemption in the first class in this act be constitutional.

"Under the law as it was passed, a person who is entitled to a legacy of \$10,001 is taxed \$400.04, and will actually receive only \$9,600.96, while a person who has a legacy of only \$10,000 is taxed \$300, and actually receives \$9,700, or about \$100 more than the person who, under the will was entitled to the larger legacy. Again, the person who receives more than \$50,000, is taxed \$600 on the first \$50,000, while the person who received only \$50,000 is taxed \$500 on it. Is this reasonable? Is this, as the Ohio Supreme Court says, 'equal protection?' Why should a man who has a right to receive \$50,000 worth of property be only taxed \$500, while a man who receives an estate exceeding \$50,000 be taxed on an equal amount \$600? If the persons who are to receive, under this part of the law, \$10,000 or less, are considered as one class, and those who receive from \$10,000 to \$20,000 another class, and those who receive from \$20,000

¹ A printed copy of this opinion is filed herewith.

to \$50,000 another class, and those who receive in excess of \$50,000 another class, then it is true that each one of these four classes respectively is taxed uniformly as to the class upon which it operates, but is there any good reason for considering this a reasonable classification?

"It may be urged with a great deal of force that this law is in contravention of Section 2, Article II of the Constitution, which says that the fundamental rights of property and liberty cannot be taken without due process of law or the 'law of the land.' 'The law of the land is the opposite of arbitrary, unequal and partial legislation. The legislature has no right to deprive one class of persons of privileges allowed to other persons under the same conditions.' (*Ritchie v. People*, 155 Ill., 105.) * * *

"Is there any distinction in rights and privileges that differentiate, in any important particulars, the persons who receive by will \$20,000 and no more, from the class of persons who under this law receive by will \$20,100? Is not a rule purely arbitrary that compels a person who receives more than \$20,000 by will to pay four per cent. on the first \$20,000 that he receives, and a person who receives by will not to exceed \$20,000 paying but three per cent.? This classification into the \$10,000 amounts, \$20,000 amounts, and \$50,000 amounts creates classes of persons who possess rights and privileges not allowed to other persons under the same conditions. * * *

"If this arbitrary division, as laid down in this law is to be sustained, what is to hinder the enactment of a law dividing into classes, which has even less justification and reason than this? In my judgment this law tends directly and necessarily to disproportion in taxation."

In discussing a similar point under the Massachusetts act, LATHROP, J., dissenting in *Minot v. Winthrop* (162 Mass., 113, 130) said:

"There is also another objection to which I see no answer. If this tax is to be considered constitutional on the ground that it is a tax upon the privilege of taking by devise or succession, there is clearly on the face of the act no equality. Suppose A. and B. die seized of separate estates, the respective values of which, after payment of debts, are ten and over ten thousand dollars. A. bequeaths a legacy to C. of five thousand dollars, and B. bequeaths a legacy to D. of the same amount. C. and D. each enjoy the same privilege; yet C. pays no tax, while D. pays a tax of \$250. Can this be said to be equal, or even reasonable? The necessary effect of the tax is to produce inequality; and, in my judgment, it is as much the duty of the court to declare the statute to be in violation of the Constitution, as if it imposed a tax upon property and were disproportionate."

III.**THE SCOPE OF THE FOURTEENTH AMENDMENT AND ITS REGULATION OF TAX LAWS IN THE VARIOUS STATES.**

It is now well settled that the tax laws of the states are within the purview of the fourteenth article of amendment to the Constitution of the United States and are subject to its limitations. Whatever may have been the occasion or origin of the amendment, the framers were not legislating for a particular race or locality, but for all time and for all occasions. The civil war and the complications following it had shown that the general guaranty of a republican form of government in the Constitution (section 4 of article IV.) was insufficient and inadequate to afford protection against unequal, arbitrary or spoliative legislation on the part of the states. A shield was, therefore, forged to protect all, everywhere, from arbitrary and spoliative legislation, and the duty was confided to the national judiciary of enforcing due process of law in respect of the life, liberty or property of the citizen and the guaranty of the equal protection of the laws.

Prior to the adoption of the amendment, the sovereign power of the states was supreme. Private property could be confiscated and vested rights sported with and nullified under the pretence of taxation, but the sufferer could not seek redress in the federal tribunals. No arbitrary exercise of power on the part of legislatures and local courts in reference to property could be redressed or checked by the national judiciary except in the case of bills of attainder or laws impairing the obligation of contracts. The prohibition against *ex post facto* laws only applied to criminal cases. Rights deemed fundamental and inherent in our system of

government might have been abridged or denied by the local courts, but there was no appeal to the Supreme Court of the United States. The people had become impressed with the fact that the main danger to the perpetuity of the nation was to be found in the powers exercised by the states. It was to remove all opportunity for any abuse of state power, and to give to the people safeguards of the highest value that the fourteenth amendment was adopted. Mindful of the facility with which state constitutions are changed, the framers of the amendment sought to nationalize the principle of equality and to fix an immutable standard applicable under all circumstances. The solemn act of amendment embodied the judgment, the conscience and the will of the people as a nation after the practical experience of three-quarters of a century. The limitations thus imposed are universal in their application, and directed to any and every mode of state action. The very object of the restriction was to ordain and enforce the fundamental rule of equality so that it could not be varied according to the passion or caprice of a majority. The amendment was the outward manifestation of the conviction of the people—the expression of their determination—that equality should rule our destinies as a national right—equality of rights, equality of duties, equality of burdens.

In *Hurtado v. California*, 110 U. S., 516, 536, Mr. Justice MATTHEWS said:

“The limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of

public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

The fourteenth amendment not only imposed as a restraint on state legislation the time honored provision of Magna Charta and of the fifth amendment—that no man shall be deprived of life, liberty or property without due process of law, but it went further and adopted an additional provision, in language new to our constitutions, viz.: that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

It has not been necessary for the Court to define the scope of this additional guaranty, and it is fortunate and wise that no attempt has been made to fix by definition the bounds of any such constitutional limitation. But the Court has declared (*Yick Wo v. Hopkins*, 118 U. S., 356, 369) that

"THE EQUAL PROTECTION OF THE LAWS IS A PLEDGE OF THE PROTECTION OF EQUAL LAWS."

The fourteenth amendment guarantees equal tax laws, and a law providing for a graduated or progressive tax—whether imposed upon property or upon the privilege or right of succession—is a denial of the equal protection of the laws.

That the framers of the fourteenth amendment may not have contemplated the restriction or prevention of progressive taxation is, of course, immaterial. But it is well known that the subject of unequal and discriminating taxes was in the contemplation of the joint committee of Congress. Indeed, if it had been the particular intention to prohibit graduated or progressive taxation, no other or additional words would have been used. The case is clearly within the language as

well as the spirit of the limitation. As was said by Chief Justice MARSHALL in *Dartmouth College v. Woodward*, 4 Wheaton, 518, 644-5 :

"It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception."

Numerous decisions have now settled the doctrine that the fourteenth amendment protects the property of all persons from spoliation or confiscation under the operation or mask of arbitrary tax laws ; and indeed most of the important litigation under the fourteenth amendment arises in tax cases. It will always be from the exercise of the taxing power that we must most apprehend arbitrary and unequal laws.

In the first case which presented to the federal courts the consideration of tax laws under the fourteenth amendment, Mr. Justice FIELD said (*The Railroad Tax Cases*, 13 Fed. Rep., 722, 733-4) :

"The fourteenth amendment to the constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive anyone within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms,—in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. * *

"What is called for under a constitutional provision requiring equality and uniformity in the taxation of property must be equally called for by the fourteenth amendment. The forced contribution from one which would follow taxation of his property without reference to a common ratio, would be inconsistent with that equal protection which the amendment requires the state to extend to every person within its jurisdiction."

In *County of Santa Clara v. Southern Pac. R. Co.*, 18 Fed. Rep., 385, 396, 397, 398, 399, Mr. Justice FIELD again said :

"Until the adoption of the fourteenth amendment there was no restraint to be found in the constitution of the United States against the exercise of such power by the states. * * The first section of the fourteenth amendment places a limit upon all the powers of the state, including, among others, that of taxation. * *

"Oppression of the person and spoliation of property by any state were thus forbidden, and equality before the law was secured to all. In the argument of the *San Mateo Case* in the supreme court, Mr. Edmunds, who was a member of the senate when the amendment was discussed and adopted by that body, speaking of its broad and catholic spirit, said: 'There is no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned, and intended to mean the full and beneficial thing that it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand' which was not considered. And the purpose of this long and anxious consideration was that protection against injustice and oppression should be made forever secure—to use his language—'secure, not according to the passion of Vermont, or of Rhode Island, or of California, depending upon their local tribunals for its efficient exercise, but secure as the right of a Roman was secure, in every province and in every place, and secure by the judicial power, the legislative power, and the executive power of the whole body of the states and the whole body of the people' * *

"Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment."

In the *Kentucky Railroad Tax Cases*, 115 U. S., 321, 337, Mr. Justice MATTHEWS said :

"The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, SO THAT THE LAW SHALL OPERATE EQUALLY AND UNIFORMLY UPON ALL PERSONS IN SIMILAR CIRCUMSTANCES."

In *Phila. Fire Asso. v. New York*, 119 U. S., 110, 120, 121, Mr. Justice HARLAN, in the dissenting opinion, said :

"The denial of the equal protection of the laws may occur in various ways. It will most often occur in the enforcement of laws imposing taxes. An individual is denied the equal protection of the laws if his property is subjected by the state to higher taxation than is imposed upon like property of other individuals in the same community."

The Court has repeatedly held that the fourteenth amendment requires that all persons subject to legislation "shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." (*Hayes v. Missouri*, 120 U. S., 68, 71-2; *Missouri Ry. Co. v. Mackey*, 127 U. S., 205, 209.) As Mr. Justice SHIRAS said in *Hallinger v. Davis*, 146 U. S., 314, 321 :

"It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

In *Barbier v. Connolly*, 113 U. S., 27, 31, 32, Mr. Justice FIELD said :

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws' undoubtedly intended not only that there should be no * * arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights ; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property ; * * * that no greater burdens should be laid upon one than are laid upon others in the same calling and condition * * *. Class legislation, discriminating against some and favoring others, is prohibited."

IV.

AS TO THE POWER OF CLASSIFICATION.

The power of the states to determine and classify the subjects of taxation or the rate at which taxes shall be levied is not challenged. But, "the power of the state stops at injustice."¹ Such classification and the degree of taxation of the selected subjects are within legislative discretion, yet under the restraint of the supreme law of the land, which ordains that taxes shall be levied through equal laws impartially administered. The fourteenth amendment leaves the power of taxing the people and property of a state unimpaired as it was prior to 1866, and leaves the state government as theretofore with full command of all its resources, subject only to the requirement of equality. We have in that requirement a principle which is safe for the people and safe for the states. If the just and wise rule of equal taxes be observed, there never can be any clashing of sovereignty. The state legislatures following the just rule of equality, are untrammelled by interference on the part of the federal courts. Then, as Chief Justice MARSHALL said in *McCulloch v. Maryland*, 4 Wheaton, 316, 430:

"We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."

Upon this question of classification, it will be instructive to recall some of the decisions in prior cases, which have declared the limits within which this power must be exercised.

The classification contained in the Illinois statute is

¹ McKENNA, C. J., in *Southern Pac. Co. v. Board of Railroad Commissioners*, 78 Fed. Rep., 236, 257.

not only unusual but "heretofore unknown" to the legislation of Illinois and "to the practice of our governments." No state has ever imposed a graduated property or inheritance tax which has been sustained by the courts. In New York, at the last session of its legislature, an act was passed imposing a tax progressing to fifteen per cent. on large estates, but the Governor of that State vetoed the measure on grounds of statesmanship and constitutional law.

In *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S., 232, 237, Mr. Justice BRADLEY said :

"All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise."

Mr. Justice FIELD, in *Home Ins. Co. v. New York*, 134 U. S., 594, 606-7, said that classification of property for taxation was not prevented by the fourteenth amendment and not open to objection if all within any particular class selected "are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected."

In *Giozza v. Tiernan*, 148 U. S., 657, 662, Chief Justice FULLER used the following language :

"Nor, in respect of taxation was the (fourteenth) amendment intended to compel the State to adopt an iron rule of equality. * * * *It is enough that there is no discrimination in favor of one as against another of the same class.* * * And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

And at the last term of the Court the whole subject of classification by the states in its various aspects, was reviewed. In *Gulf, Colorado and Santa Fé Ry. v. Ellis*, 165 U. S., 150, 155, 159, 160, 165, a classification was held unconstitutional because "the rule of equality is ignored." Mr. Justice BREWER said :

" Yet it is equally true that such classification cannot be made arbitrarily. The State * * may not say that all men beyond a certain age shall be alone thus subjected, OR ALL MEN POSSESSED OF A CERTAIN WEALTH. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

The language of SWAYNE, D. J., *In re Grice*, 79 Fed. Rep., 627, 645, may well be quoted :

" This subject of equality before the law is a fundamental principle of English and American liberty, which not only has been held sacred in all latter-day constitutions, state and federal, but the principle has been guarded by the courts with jealous watchfulness, to see that the citizen may have guaranteed to him this inestimable privilege and condition."

After reviewing numerous decisions of this Court on this point, Judge SWAYNE continues (p. 646) :

" This statute under discussion is clearly class legislation, discriminating against some and favoring others. It is not that character of legislation which, in carrying out a public purpose, is limited in its application, and, within the sphere of its

operation, affects alike all persons similarly situated. It may affect, and does affect, individuals of the same class in an opposite way. It favors some individuals of a certain class, and denounces other individuals of the same class. This statute exempts no class. On the contrary, it seeks to exempt certain classes of property, which is carrying the doctrine beyond any case to which we have had access. All property in the state is entitled to equal protection, and no special property is entitled to, or ought to receive, any special favors. Discrimination may be as potent against the citizen, in the direction of his property, as if aimed directly against himself personally."

In *Northern Pacific R. Co. v. Walker*, 47 Fed. Rep., 681, 686, CALDWELL, J., said :

"Property of the same kind, and in the same condition, and used for the same purpose, cannot be divided into different classes for purposes of taxation, and taxed by a different rule, because it belongs to different owners."

In *State v. Loomis*, 115 Mo., 307, 314, the Supreme Court of Missouri, by BLACK, J., said :

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

V.

AS TO THE POWER OF THE STATES TO REGULATE SUCCESSIONS TO THE PROPERTY OF DECEDENTS.

Even if it be assumed that the state is the natural successor to dead men's property; that its intestate laws and statutes of wills are acts of grace, and that it can destroy the privilege of inheritance or testamentary disposition and escheat all property, the Illinois act is still repugnant to the fourteenth amendment. The acts of grace of a state are not like the gifts of a private person or of an

irresponsible despotic sovereign who bestows according to his fancy. They are solemn laws which must affect impartially and equally all persons within their purview. Though the ability to share in an estate may be called the privilege of succession, the privilege while unrevoked must be treated as an equal right and granted impartially: it cannot be granted to those of moderate means and denied partially or wholly to those of large means. The Supreme Court of Illinois in its opinion on this act refers very properly to the "right of succession." This right, whatever its origin and character, is capable of enjoyment, and those who enjoy it are entitled to "the equal protection of the laws."

It may be conceded that the principles of classification which the Court has declared in expounding the fourteenth amendment do not inhibit a state from placing the estates of decedents or rights of succession thereto in a distinct class for purposes of taxation. Having drawn a line between the transfer of property of living persons and the transfer of estates of decedents, the state may subject the latter to further classification in respect of successors. Thus aliens may be singled out for special burdens or excluded altogether in accordance with well-known principles, and distinctions may be drawn between relatives and strangers, and relatives may be classified according to their degree of kinship to the decedent.

All these classes may be defined and different rates may be imposed upon property passing to each without necessarily denying to successors the equal protection of the law, for in each case the classification rests upon an intelligible and reasonable foundation when all in the class selected are equally taxed or equally exempted.

But when the state selects a particular class of individuals for taxation, it must tax them upon exactly the same rules of equality which govern the classification of the property of other persons. If property cannot be subjected to a progressive tax, neither can the privilege of succession to an estate. If an owner of property cannot be favored with a large exemption, neither can his successors or legatees.

Should a state demand a contribution of one per cent. from the \$20,000 farm of A, and five per cent. from the \$50,000 farm of B, and exempt all farms under \$10,000 in value, it would deny to A and B the equal protection of the laws. There can be no reasonable doubt of the unconstitutionality of such a scheme of taxation.

A supposed public right of absolute control over the property of decedents is the real basis of the decision of the Supreme Court of Illinois in sustaining the Inheritance Tax law. The court refers to the tax as "the amount reserved to the state from the estate of a deceased owner," and if the state may *reserve* a part it may retain the whole. Indeed, the only plausible justification for this tax law is that the power of the state in the premises is so absolute that those who share in an estate should be thankful for what they are allowed to receive.

There is no ground upon which a decedent's estate or rights therein can be distinguished from property in its usual condition, so that while the latter must be classified according to essential characteristics, the other may be classified according to a graduated scale of values. Value in this relation is plainly unrelated to character. Should it be approved as a basis of classification, the resulting classes could be divided by

arbitrary lines capable of indefinite multiplication at rates wholly arbitrary. The only safe course is to hold that the states are bound to treat the property of decedents as private property, and must classify it for taxing purposes according to the principles of equality which obtain in the taxation of other private property.

The consideration of the questions of legislative power presents two aspects, which may be noticed : the one, as to the right of inheritance ; the other, as to the right of a testator to bequeath his property.

The right of inheritance existed in England long before the Conquest, and it was recognized and perpetuated in the great charters of English liberty.¹ It is treated as "our common law of inheritance." An act depriving children of all right to inherit and forfeiting or escheating to the state the property of their parents would, it is submitted, be declared utterly in conflict with the theory upon which our political institutions rest, and an infringement of inalienable rights beyond the power of our governments. This right of inheritance was recognized in the ordinance of 1787 for the government of the northwest territory and subsequently embodied in the Illinois constitutions.

In the latest authoritative history of English law,² the learned authors say :

"In calling to our aid a law of intestate succession, we are not invoking a modern force. As regards the German race we cannot go behind that law ; the time when no such law existed is in strictest sense a prehistoric time."

The federal courts have yet to intimate that the states have the power to deny inheritance and to escheat the property of a decedent to the exclusion of his family.

¹ Pollock & Maitland's Hist. Eng. Law, book 2, pp. 237 *et seq.* ² *Ibid.*, p. 257. ³ *Ibid.*, p. 248.

As Mr. Justice BROWN says in *U. S. v. Perkins*, 163 U. S., 625, 628 :

"The general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents."

The right to devise or bequeath property at will has been said to be a limitation upon inheritance as well as a power to prevent escheat. However originating—whether in statute or in the old customs and the practice of *post obit* gifts—the power has been recognized as an incident of the right of property from time immemorial and has been considered a common law right in America.¹ As BLACKSTONE said ² :

"With us in England, this power of bequeathing is coeval with the first rudiments of the law: for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the Conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law."

In *Windham v. Chetwynd*, 1 Burr., 414, 419, Lord MANSFIELD said that the power of devising was "a natural consequence of property, and the right a man has over his own. It was a right by the law of the land before the Conquest, and down to about the time of Henry the 2d. It ceased, consequentially only, by the introduction of feudal tenures; because, originally, every species of alienation was contrary to that system. As soon as the power of alienation *inter vivos* was indulged, testaments followed, indirectly, as declarations of uses." (See also *Stewart's Executor v. Lisenard*, 26 Wend., N. Y., 255, 296-7.)

The right of the state to designate heirs, to exclude

¹Hammond's Blackstone, book 2, p. 579, note 69.

²Book 2, Ch. 32, p. 491.

aliens, to confer rights of curtesy and dower, to forbid perpetuities, to safeguard creditors, and otherwise regulate the holding of property, is consistent with its inability to convert estates to public use upon the death of the owner.

And, as Chief Justice Waite said of another governmental power of regulation, "this power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."¹

The state may reasonably limit the right of devise and bequest just as it may regulate the transfer or the holding of real or personal property, but it cannot by any general or partial act of escheat or attainder confiscate all property. The status of husband and wife, of lineal and collateral relatives, of strangers, aliens and creditors, may be said to depend in a sense upon the favor of the state. But this favor is not granted as an alternative to the succession of the state. The estate of a decedent is to go to some person or persons; to what persons and in what proportions the state may determine and regulate, and that is the extent and limit of its power.

In the cases now before the Court, it is not necessary to decide whether the legislature of any state can destroy the right of inheritance or of devise and bequest. The state here has not attempted to do so. It has sought to regulate the exercise of the right by laws unequal in their operation, and their arbitrary features are sufficient to annul them.

In *Minot v. Winthrop*, 162 Mass., 113, 117, the Supreme Judicial Court of Massachusetts said:

"The descent or devolution of property on the death of the owner in England and in this country has always been

¹ *Railroad Commission Cases*, 116 U. S., 307, 331.

regulated by law. We have no occasion in these cases to consider whether the legislature has the power to make the Commonwealth the universal legatee or successor of all the property of all its inhabitants when they die, for the purposes not only of paying the public charges, but also of distributing the property according to its will among the living inhabitants, or for the purpose of abolishing private property altogether. We assume that under the Constitution this cannot be done, either directly or indirectly; that the legislature cannot so far restrict the right to transmit property by will or by descent as to amount to an appropriation of property generally; that it cannot impose a tax which shall be equivalent, or almost equivalent, to the value of the property, and cannot so limit the persons who can take as heirs, devisees, distributees, or legatees that the great mass of all the property of the inhabitants must become vested in the Commonwealth by escheat. The state can take property by taxation only for the public service, and we assume that its right to take property, if any exists, by regulating the distribution of it on the death of the owner, is limited in the same manner, and that this right must be exercised in a reasonable way."

When the question is presented as to whether or not a state has the absolute, unrestrained power to escheat or confiscate the property of a decedent, this Court will find no difficulty in denying the existence of any such arbitrary and despotic power. If such a law were directed against certain individuals or those possessed of certain wealth, the legislation would be nothing less than a bill of attainder covered by the express provision of section 10 of Article I of the Constitution; for, as is well known, attainder was used in a generic sense, and includes the confiscation of the property of an individual or classes of individuals.¹

Chief Justice MARSHALL said in *Fletcher v. Peck*, 6 Cranch, 87, 135, 137-8:

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they

¹ 3 Am. & Eng. Encyc. of Law, sec. ed., p. 248.

to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. * *

"Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

"No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

"A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."

To quote Mr. Justice MILLER's famous language in the case of *Loan Association v. Topeka*, 20 Wall., 655, 662:

"It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

In *Hurtado v. California*, 110 U. S., 516, 535, 536, Mr. Justice MATTHEWS said :

*"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. * * * Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."*

In *Caldwell v. Texas*, 137 U. S. 692, 697, Mr. Chief Justice FULLER said :

"Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent Comm., 13. AND DUE PROCESS IS SO SECURED BY LAWS OPERATING ON ALL ALIKE, AND NOT SUBJECTING THE INDIVIDUAL TO THE ARBITRARY EXERCISE OF THE POWERS OF GOVERNMENT, UNRESTRAINED BY THE ESTABLISHED PRINCIPLES OF PRIVATE RIGHT AND DISTRIBUTIVE JUSTICE. Bank of Columbia v. Okely, 4 Wheat., 235, 244. THE POWER OF THE STATE MUST BE EXERTED WITHIN THE LIMITS OF THOSE PRINCIPLES, AND ITS EXERTION CANNOT BE SUSTAINED WHEN SPECIAL, PARTIAL AND ARBITRARY. Hurtado v. California, 110 U. S., 516, 535."

It is, therefore, submitted that any law, special, partial and arbitrary in its operation, escheating the private property of individuals on their death, would be declared unconstitutional.

Three cases in this Court are sometimes cited as establishing the doctrine that a state may deny the privilege of transfer by last will and testament or by inheritance ; but they sustain no such proposition. The misconception of the scope of these decisions arises from confounding the conceded power to regulate inheritance and testamentary dispositions with the theory that these rights depend solely upon statute and can be wholly abrogated. The

State can regulate such transfers as it can declare who shall hold property within its borders and the manner, the form, the method of transfers *inter vivos*. But no one would, in reason, take the extreme view that this power of regulation, *e. g.*, the conveyance of lands, would enable the state to pass a law prohibiting all sales and dispositions of property or unreasonably and arbitrarily limiting the use of property. A deed may have to be under seal, with certain formalities, accompanied by the payment of a stamp tax, etc.: all this is regulation. But, to unreasonably and arbitrarily limit the use or restrain transfers even to resident citizens would be quite a different thing. It would be confiscation and not regulation.

In the first case (1850), *Mager v. Grima*, 8 How., 490, 493-4, the Court held that a law of the State of Louisiana imposing a tax on alien heirs or legatees was not in violation of the United States Constitution. Chief Justice TANEY delivering the opinion of the court said:

"Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state. In many of the states of this Union at this day, real property devised to an alien is liable to escheat. And if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

It will thus be seen that there is nothing in this case to support the doctrine that a state can escheat all property and deny to its own citizens the right to inherit or to devise. Of course, the last sentence of the quotation, separated from the context, may appear to mean what was never intended.

The second case, *United States v. Fox*, 94 U.

S., 315, held that a devise to the United States of real estate situated in New York was void under the local law. The question was determined according to the laws of New York, and the case involved merely the point of the validity of the limitation imposed by the state law. There was no discussion and no suggestion as to the power of the state to confiscate the property of all decedents or decedents of any particular class.

In the third case, *United States v. Perkins*, 163 U. S., 625, 628, the Court held that personal property bequeathed to the United States was subject to the New York inheritance tax, and that the payment of this tax was a condition of transfer which the state had a right to impose.

It has been said that succession taxes are not imposed upon property but are rather an excise duty upon peculiar rights or privileges conferred by statute. This view seems to have influenced some courts to sustain succession tax laws which, had they been held to impose burdens on property, might have conflicted with the provisions of the state constitutions.

But as Judge EARL said in regard to the New York act of 1885 taxing successions (*Matter of McPherson*, 104 N. Y., 306, 317, 318):

"It is not very important to determine in this case whether the act of 1885 is to be regarded as imposing a tax upon property or upon the succession or devolution of property by will or intestacy. *In either case it is a special tax.* In the one case it is a tax upon the particular class of property, and in the other case a tax upon the succession or devolution of property, or the right to receive property in the cases mentioned in the statute. Whether it be one or the other it is free from constitutional objection. * * * * If this be regarded as a tax upon property, then it is free from constitutional objection if it be equally imposed and properly apportioned upon all the property of the class to which it belongs."

The Supreme Court of Pennsylvania has decided that as to real estate the act of 1887 taxing collateral inheritances is a tax upon property, and finds proof of this in the provision (to be likewise found in the Illinois act) that the tax shall be a lien upon real estate until paid (*Bittinger's Estate*, 129 Pa. St., 338). And PENROSE, J., in the recent Pennsylvania decision (December 4, 1897), said :

"And yet we are solemnly asked to say that this is not a tax, but an excise or duty. What is an excise or duty but one species of tax?"¹

It is, however, immaterial to determine whether the exaction be termed a *tax* or a *penalty* or a *bonus* or a *premium* or a *reservation*—whether one or another of these terms may be preferred by state courts in order to satisfy the provisions of state constitutions. The fourteenth amendment sets up a standard by which the tax or exaction shall be imposed, namely, by laws which have due regard to some rule of equality. The progressive tax now before the Court ignores that requirement.

There are only two methods by which the state governments can take private property; the one through the taxing power, the other through the right of eminent domain. The state cannot confiscate, by bill of attainder or otherwise. The fundamental distinction between these two methods is that under the taxing power, the laws and exactions must be uniform and impartial—a common contribution of burden—equally affecting all within the class or subject selected; while under the exercise of the right of eminent domain

¹ That the exaction we are now considering is a *tax* has been held by this Court in *U. S. v. Perkins*, 163 U. S., 625, 628, and by the Illinois Supreme Court in the Drake case (record, pp. 9-10). See also *The State ex rel. Sanderson v. Mann*, 76 Wis., 469, 475).

particular or special property is singled out for public use and to make contributions to public purposes which are not demanded of other property of the same general character.

In *Lowell v. Boston*, 111 Mass., 454, 461, 462, the Supreme Judicial Court of Massachusetts used the following language :

"The principle of this distinction is fundamental. It underlies all government that is based upon reason rather than upon force. * * * This power, when exercised in one form, is taxation ; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise, but identical in their source, to wit, the necessities of organized society ; and in the end by which alone the exercise of either can be justified, to wit, some public service or use."

But the power of eminent domain is conditioned upon making just compensation, so that the principle of equality shall prevail and the public burdens shall not be borne merely by specific individuals or specific property selected out of the same general class. Even without any constitutional provision of the states, this Court would hold that just compensation was essential since the fourteenth amendment went into effect (*Chicago, Burlington, etc., R'd. v. Chicago*, 166 U. S., 226, 238.)

VI.

AS TO THE INHERITANCE TAX LAWS IN OTHER STATES.

Laws similar to this Illinois statute have been declared to be in violation of the principle of equality, and as such held to be unconstitutional.

In New York, Pennsylvania, Massachusetts, Maine, Maryland, Montana, Virginia and North Carolina, various

kinds of laws taxing inheritances have come before the courts of last resort and have been sustained. In some of these cases, it has been held that a law taxing only collaterals and exempting direct heirs was not in violation of the requirements of uniformity, as the classification into direct heirs and collaterals was founded upon just and reasonable grounds. In others, the variation of rates of taxation between direct and collateral heirs and strangers to the blood has been sustained as proper. In all these instances, however, the rate has been uniform upon each individual in the class taxed.

Statutes imposing succession taxes upon persons classified according to their relation to the decedent, exempting comparatively small estates, and imposing a single rate have been frequently approved. (*Matter of McPherson*, 104 N. Y., 306; *Strode v. Commonwealth*, 52 Pa., 181; *Minot v. Winthrop*, 162 Mass., 113; *Wilmerding's Estate*, 49 Pac. R., 181 (California); *State v. Dalrymple*, 70 Md., 294; *Peters v. Lynchburg*, 76 Va., 927; *State v. Alston*, 94 Tenn., 674.)

In no case, except the decision in the Drake case, has a law levying a graduated or progressive tax rate upon the same class been sustained. Whenever this has been the clear purpose, the laws have been held to be in violation of the principle of equality. The progressive tax which is so pronounced and objectionable a feature of the Illinois statute has been held to be unconstitutional by the only other state courts of last resort by which it has been considered.

Three cases involving progressive taxation were decided by the Supreme Courts of Minnesota, Wisconsin and Ohio, respectively, before the Illinois decision, and in New Hampshire a classification exempting from the tax husband and wife, children and grandchildren was

denominated extortion in the name of taxation and the law was declared void.

The latest case upon this point is in Pennsylvania. In the Orphans' Court of Philadelphia the court *in banc* decided, December 4, 1897, that an inheritance tax far less arbitrary than the Illinois act violated the rule of uniformity and was unconstitutional, FERGUSON, J., saying :

"Again taxes are to be uniform on the same 'class of subjects.' The class of subjects contemplated by this act is personal property by will or under the intestate laws. Now if the amount of the estate so passing is less than \$5,000 it escapes taxation and if over \$5,000 it is taxable. Surely this cannot be considered a uniform tax on the same class of subjects, as the amount of the personal property which is the subject of taxation determines whether it is taxable or not."

In *State v. Ferris*, 53 Ohio State, 314, there was involved an inheritance tax law which levied a graduated tax varying from one to six per cent., according to the amount of the estate affected, upon the class first mentioned in the Illinois law, and exempted all estates less than \$20,000 in value, but did not allow the same exemption to the takers of estates exceeding \$20,000 in value. The court held that the law was wholly void, first, because of the inequality resulting from the exemption of \$20,000, and secondly, because it taxed at a higher rate per centum the right to receive or succeed to estates of larger value than those of smaller value. The court discussed the fourteenth amendment in the course of its decision, but held that the bill of rights in Ohio was as broad as the amendment itself and afforded adequate protection against unequal taxation.

In *State v. Gorman*, 40 Minn., 232, 233, 234, 235, the statute, under the guise of a fee bill for court costs,

required as a condition precedent to probate proceedings for settlement of estates, the payment to the county treasurer of specific sums, varying in amount according to the value of the estate, and not equal in proportion to such value but arbitrarily fixed on an increasing scale with reference to such value, running from \$10 on \$2,000 estates to \$5,000 on estates of over \$500,000.

The court held that the rule of uniform protection in the matter of taxation required by the state constitution was violated and declared the law unconstitutional. It said :

" But the sums required by this act to be paid into the county treasury must be regarded as *taxes* in the ordinary sense of that word, and as it is used in the constitution. They are not in any proper sense fees or costs assessed impartially, or with regard to the expense occasioned or services performed. The amounts are regulated wholly, but arbitrarily, with regard to the value of the estate. * * * It is thus apparent that these exactions are '*taxes*,' in the general and in the precise meaning of that word, and, *if the constitutional rule of approximate equality has been disregarded, the law cannot stand.* It seems hardly necessary to refer particularly to the schedule of values and of amounts required to be paid to show that the law wholly fails, in apportioning the burden imposed, to regard the constitutional rule of equality, measured with reference to the value of the property taxed. In the first place, estates not exceeding \$2,000 in value are wholly exempt from any contribution. If estates are taxable in this manner at all, such an exemption is contrary to the requirement of the constitution. (*Le Duc v. City of Hastings*, 39 Minn., 110.) Again, while the schedule of sums to be paid is arranged somewhat with regard to values, yet this is done arbitrarily, and not upon any rule of percentage; and the burden is very unequally distributed as measured by the standard of values. To illustrate, an estate of a little less than \$50,000 pays a tax of \$100, or about one-fifth of one per cent. of the value; an estate ten times larger pays a tax fifty times larger, (\$5,000,) or about one per cent. of the valuation; an estate of \$500,000 pays a tax of \$1,000, while an estate inventoried at \$500,001, \$1 in excess of the former, pays a tax of \$5,000. While a large discretion must be allowed to the legislature in devising schemes for taxation, so as to secure equality as nearly as

may be, it can hardly be doubted that in this case the constitutional requirement was not observed, very likely for the reason that it was not considered that these exactions were 'taxes' within the meaning of the constitution. We feel certain that they must be so regarded."

In *State v. Mann*, 76 Wis., 469, 480, the statute in question levied a charge of one-half of one per cent. on all estates exceeding \$3,000 in any county having a population of over 150,000. Milwaukee County was the only county to which the act was applicable. The court held the act void, first, as to the territorial limitation, and secondly, as to the exemption of all estates below \$3,000 in value.

In *Curry v. Spencer*, 61 N. H., 624, 631, 632, the statutes levied a tax of one per cent. on all estates except those passing to husband or wife, children or grandchildren. The court held the law unconstitutional because it violated the provisions of the constitution and bill of rights limiting the power of the legislature to levying only proportionate and reasonable taxes. Said the court :

"All measures for the imposition or collection of taxes must therefore conform to this general principle of just equality; and hence it is immaterial whether the tax imposed by c. 64 is to be regarded as a tax on property or upon a civil right or privilege, for the same principle of equality and due proportion applies to every species of tax alike. * * * We therefore go no further than to say, that if the legislature deems it expedient to defray the expense of probate courts by a tax upon the recipients of estates therein adjudicated, such tax must be proportional and constitute only the just share of those upon whom it is imposed; that it cannot lawfully make discriminations and cast the burden upon one class of beneficiaries, and exempt all other classes from its operation; and that it cannot, therefore, for purposes of taxation, exempt legacies and successions to husband, wife, children, and grandchildren, and include only those by the collaterals and others than those specified.

It is true that this form of tax comes down from antiquity (Gibbon's *Decline and Fall of the Roman Empire*, c. 6), and

that the tax commissioners of this State, by whom it was recommended, say that there can be no question of the legal right to impose it (Report, p. 31); but nevertheless, we entertain a contrary opinion, because, under the reservations of the bill of rights and the limitations of the constitution, it is plainly founded upon pure inequality and is simply extortion in the name of taxation; and it can therefore never be sustained in this jurisdiction so long as equality and justice continue to be the basis of constitutional taxation."

In *State v. Hamlin*, 86 Maine, 495, 505, the Supreme Judicial Court of Maine said :

"It (the legislature) may limit heirship to lineal descendants, to the absolute exclusion of all collaterals. If it permits, as our laws now do, collateral kindred to inherit, no reason is perceived why the State is debarred from exacting an excise or duty from such collateral, for such privilege allowed by the State. *It is necessary to make such excise uniform as to the entire class of collaterals. It must not tax one and exempt another in the same class.* But it is not a violation of this principle to require an excise from all collaterals and strangers, and exempt from the excise classes nearer in blood to the decedent.

In *Gelsthorpe v. Furnell* (as yet unreported), decided by the Supreme Court of Montana at the October Term, 1897, an inheritance tax at a fixed rate on every \$100 of the value of successions, exempting estates of a less value than \$7,500, was sustained. The court did not regard this exemption as introducing the feature of progression, but as a reasonable and proper classification. The court said :

"The Legislature is not prevented by the Constitution from the exercise of discretion as to what classes of rights or privileges it may enumerate as subject to taxation, *provided always the tax imposed is uniform in its application to all rights and privileges within the classes defined; and provided further, we take it, that any classification made is based upon a reasonable and not a mere arbitrary ground.*"

In New York there is no progression and only a small and reasonable exemption. In construing the

act of 1885 in that state, the Court of Appeals, by EARL, J., said (*Matter of McPherson* 104 N. Y., 306, 318) :

“If this be regarded as a tax upon property, then it is free from constitutional objection *if it be equally imposed and properly apportioned upon all the property of the class to which it belongs.*”

And, in the subsequent case of *Matter of Estate of Sherwell*, 125 N. Y., 376, 379, GRAY, J., said :

“As the tax is made to apply to every estate, which is bequeathed or devised to, or inherited by, the persons specified in the act, *it is equal and, therefore, free from objection on legal grounds.*”

The sharpest criticism of the Illinois Act comes from the Supreme Court of Colorado, which in answer to a request from the Legislature for an opinion on a pending bill said (*In re House Bill No. 122*, 48 Pac. R., 535) :

“THE STATUTE OF THE STATE OF ILLINOIS, FROM WHICH THIS BILL IS MAINLY TAKEN, IS ONE OF THE MOST OBJECTIONABLE ACTS UPON THE SUBJECT TO BE FOUND.”

In Missouri the tax of 1895 was progressive, but the progressive feature was promptly repealed (Act of March 17, 1897, Laws, p. 236). In Louisiana, the tax on foreign heirs is uniform and contains no exemptions (Laws 1894, p. 165); nor is there any exemption or progression in Virginia (Laws 1895-6, Ch. 334).

Another instance of progressive or graduated taxation reported was in Georgia where a tax of \$150 was levied by city ordinance on merchants whose annual sales were between \$75,000 and \$100,000; of \$200 on those whose sales were between \$100,000 and \$200,000, and of \$300 on those whose sales exceeded \$200,000.

The Supreme Court of Georgia in *Johnston v. Macon*, 62 Ga., 645, 651, held the act unconstitutional for the reason that it was "against the spirit of the constitution of 1877, and might result in great inequality and injustice." *In re Yot Sang*, 75 Fed. Rep., 983, 985, the court held an ordinance which provided a tax of \$15 on steam laundries and \$25 on all others violative of the fourteenth amendment.

VII.

PROGRESSIVE OR GRADUATED TAXATION IS ARBITRARY AND ANY LAW IMPOSING IT IS NECESSARILY UNEQUAL IN ITS OPERATION.

The merits of this controversy cannot be appreciated without bearing in mind how intimately connected and interwoven are the science of government and the principles of taxation. This power to tax is not only the strongest and the most pervading of all powers of government, but the most liable to abuse. The highest attribute of the sovereignty of government is the taxing power, and when we discuss it we enter the realm of practical statesmanship, and must be influenced in great measure by considerations of politics in the grandest signification. In the service of politics thus presented, this Court applies the great principles of government which with us rest upon solid foundations of truth, justice and equality, and in the light of such considerations, solves the problems of statesmanship constantly arising. These questions must finally be determined by this tribunal since

the Constitution has made it the arbiter to enforce the protection of equal laws, and has ordained that its decisions shall be the supreme law of the land.

If progressive taxation is in its essence arbitrary and in its tendency destructive of the American system of equality before the law, the Court will not hesitate to stay the dangerous policy at its beginning. In the broad view of the true statesman, the rule by which taxes are apportioned is not for a day or a party, but for all time. There can be no stability or progress where there is no security or confidence, and there can be no security and confidence under a government which imposes unequal and inequitable taxes.

As Hamilton said in one of his papers (*The Continentalist*, Hamilton's Works, Vol. 1, p. 270) :

"THE GENIUS OF LIBERTY REPROBATES EVERYTHING ARBITRARY OR DISCRETIONARY IN TAXATION."

Although many writers and philosophers of the school of Rousseau have written in favor of progressive or graduated taxation in order, as some frankly avow, to level property and to force redistribution of wealth,¹ yet thoughtful and broad-minded statesmen and political economists have repeatedly shown that the progressive or graduated tax is the most arbitrary form of taxation, vicious in principle and dangerous in tendency. Thus, Mr. Lecky, one of the most eminent of living historians, in his latest work (*Democracy and Liberty*, Vol. 1, p. 286, *et seq.*), says :

"It is obvious that a graduated tax is a direct penalty imposed on saving and industry, a direct premium offered to idleness and extravagance. * * * It is at the same time perfectly arbitrary. When the principle of taxing all fortunes on the same rate of computation is

¹Seligman on Progressive Taxation, p. 67.

abandoned, no definite rule or principle remains. At what point the higher scale is to begin, or to what degree it is to be raised, depends wholly on the policy of Governments and the balance of parties. The ascending scale may at first be very moderate, but it may at any time, when fresh taxes are required, be made more severe, till it reaches or approaches the point of confiscation. No fixed line or amount of graduation can be maintained upon principle, or with any chance of finality. The whole matter will depend upon the interests and wishes of the electors ; upon party politicians seeking for a cry and competing for the votes of very poor and very ignorant men. Under such a system all large properties may easily be made unsafe, and an insecurity may arise which will be fatal to all great financial undertakings. The most serious restraint on parliamentary extravagance will, at the same time, be taken away, and majorities will be invested with the easiest and most powerful instrument of oppression. Highly graduated taxation realizes most completely the supreme danger of democracy, creating a state of things in which one class imposes on another burdens which it is not asked to share, and impels the State into vast schemes of extravagance, under the belief that the whole cost will be thrown upon others.

The belief is, no doubt, very fallacious, but it is very natural, and it lends itself most easily to the claptrap of dishonest politicians. Such men will have no difficulty in drawing impressive contrasts between the luxury of the rich and the necessities of the poor, and in persuading ignorant men that there can be no harm in throwing great burdens of exceptional taxation on a few men, who will still remain immeasurably richer than themselves. Yet no truth of political economy is more certain than that a heavy taxation of capital, which starves industry and employment, will fall most severely on the poor. Graduated taxation, if it is excessive or frequently raised, is inevitably largely drawn from capital. It discourages its accumulation. It produces an insecurity which is fatal to its stability, and it is certain to drive great masses of it to other lands. * *

It is, however, sufficiently clear that any financier who enters on this field is entering on a path surrounded with grave and various dangers. Graduated taxation is certain to be contagious, and it is certain not to rest within the limits that its originators desired."

In McCulloch on Taxation, pp. 141, *et seq.* (London, 1845) the author says :

" It is argued that, in order fairly to proportion the tax to

the ability of the contributors, such a graduated scale of duty should be adopted as should press lightly on the smaller class of properties and incomes, and increase according as they become larger and more able to bear taxation. We take leave, however, to protest against this proposal, which is not more seductive than it is unjust and dangerous. * * If it either pass entirely over some classes, or press on some less heavily than on others, it is unjustly imposed. Government, in such a case, has plainly stepped out of its proper province, and has assessed the tax, not for the legitimate purpose of appropriating a certain proportion of the revenues of its subjects to the public exigencies, but that it might at the same time regulate the incomes of the contributors ; that is, that it might depress one class and elevate another. The toleration of such a principle would necessarily lead to every species of abuse. That equal taxes on property or income will be more severely felt by the poorer than by the richer classes is undeniable ; but the same is true of every imposition which does not subvert the subsisting relations among the different orders of society. * * Let it not be supposed that the principle of graduation may be carried a certain extent, and then stopped. * * In such matters the maxim of *obsta principiis* should be firmly adhered to by every prudent and honest statesman. Graduation is not an evil to be paltered with. Adopt it and you will effectually paralyse industry and check accumulation ; at the same time that every man who has any property will hasten, by carrying it out of the country, to protect it from confiscation. The savages described by Montesquieu, who to get at the fruit cut down the tree, are about as good financiers as the advocates of this sort of taxes. Wherever they are introduced security is at an end. Even if taxes on income were otherwise the most unexceptionable, the adoption of the principle of graduation would make them about the very worst that could be devised. The moment you abandon, in the framing of such taxes, the cardinal principle of exacting from all individuals the same proportion of their income or of their property, you are at sea without rudder or compass, and there is no amount of injustice and folly you may not commit."

In the *North American Review* (Vol. 130, pp. 238-239), the well-known writer David A. Wells says :

" Equality of taxation of all persons and property brought into open competition under like circumstances is necessary, to produce equality of condition for all, in all production, and in all the enjoyments of life, liberty, and property. Any

government, whatever name it may assume, is a despotism, and commits acts of flagrant spoliation, if it grants exemptions or exacts a greater or less rate of tax from one man than from another man on account of his owning or having in his possession more or less of the same class of property which is the subject of the tax."

Professor Bastable is one of the leading authorities in England at the present day. In his recent work on "Public Finance" (1895), he discusses the reasons for the popularity of progressive taxation and points out the dangerous tendency and the objections to such a system. Thus at pp. 292, 293, 294, 555, the author says :

"It is entirely arbitrary. The possible scales are infinite in number, and no simple and intelligible reason can be assigned for the selection of one in preference to its competitors. * * * There is no self-acting principle by which to determine the scale of progression. * * * All depends on the will of the legislature, *i. e.* in most modern societies, on the votes of persons who will not directly feel the charges placed on the higher incomes and will probably believe that they will be gainers by them."

"But behind any actual scale of progression lies the unavoidable danger of arbitrary extension in the future. There is as yet no limiting principle discovered which will determine up to what point progressive death-duties shall be carried, and at which their advance should cease. Appeals to the supposed natural rights of owners, or to the equally imaginary rights of the State, can supply no solution of this problem."

The French writer and statesman, Leroy-Beaulieu, is probably the leading authority in Europe upon questions of finance and taxation. In his work "Traité d'Economie Politique" (1896, vol. IV, pp. 748-767), he examines and discusses at length progressive or graduated taxation, and condemns it as vicious in theory, as not based upon any rational ground, and as springing solely from sentiment and prejudice. He also shows that the theory de-

parts radically from the principle of equality and begets attempts to correct social inequalities through taxation. In the course of an exhaustive discussion of the subject of progressive taxes on property, the author says (pp. 750, 764) :

"Progressive taxation constitutes actual spoliation. It violates, besides the rule, established by all civilization, that taxation ought to be imposed with the full consent of the taxpayer ; for, it is quite clear, that in this case, it is the mass of the voters who relieve themselves of the heavy weight of the tax and cast it upon the few, and these few do not consent, even tacitly, to the excess with which the government wishes to burden them. When the rate of the tax is equal for all, we can consider that the vote for the tax by the Legislature carries with it the implied acquiescence of all the assessable ; otherwise not. * *

"Every system of progressive taxation, however attenuated, is iniquitous and dangerous."¹

And in his standard work, "Science des Finances," the same author says (Vol. I, pp. 139-140) :

"Thus, the theory of progressive taxation is not rational ; it is not the result of any accurate analysis of practicable experience ; it is superficial ; it is not a scientific doctrine.

The theory, moreover, is dangerous, because departing from the principle of equality of sacrifice, its irresistible tendency is to seek the correction of social inequalities ; and there is in that tendency a fatal allurements."²

Another French writer Paul Beauregard in his

¹ "L'impôt progressif constitue une véritable spoliation. Il viole de plus la règle, établie par toute la civilisation, que l'impôt doit être librement consenti par le contribuable : car, il est bien clair que, dans ce cas, c'est la masse des contribuables qui rejette le gros poids de l'impôt sur quelques-uns, et que ceux-ci ne consentent pas, même tacitement, à la surcharge dont on veut les grever. Quand le taux de l'impôt est égal pour tous, on peut considérer que le vote de l'impôt par les Chambres comporte un acquiescement implicite de tous les contribuables ; autrement, non. * *

"Tout système d'impôt progressif, si atténué qu'il soit, est inique et dangereux."

² "Ainsi, la théorie de l'impôt progressif n'est pas rationnelle ; elle ne sort pas d'une analyse exacte des faits sociaux ; elle est superficielle ; elle n'est pas une doctrine scientifique.

"Cette théorie est en outre dangereuse, parce que, partant du principe de l'égalité de sacrifice, elle a une tendance invincible à vouloir corriger les inégalités sociales ; il y a là un entraînement qui est fatal."

work on "Eléments d'Economie Politique" discusses the defects of graduated taxation and says (p. 313):

"This system, extolled even to-day in certain quarters, has in times past led astray great thinkers like Montesquieu and J.-B. Say. It is exposed, however, to very grave criticisms. It is unjust, for it does not proportion the charge to the benefit received, and imposes upon some expenses which must benefit others; a disadvantage particularly serious in a country of universal suffrage, where the public expenditures are voted by the representatives elected by all the citizens. It is dangerous, because, absorbing a considerable portion of the large incomes, it tends to discourage the spirit of enterprise and the taste for economy. Finally, it is arbitrary, for we cannot determine rationally the graduation capable of equalizing the charges imposed on each individual."³

In the "Dictionnaire d'Economie Politique," René Stourm writes (Vol. II, p. 21):

"On the one side graduation, abandoned to itself, results more or less in spoliation. On the other side, if the governments wish to correct the excessive play of its natural tendency, arbitrary despotism becomes the only rule. Spoliation or arbitrary despotism would be the final results of graduated taxation."⁴

He then discusses the subject of progressive inheritance taxes and shows that they necessarily involve an attack upon the natural right to dispose of property, and that if we concede such a position, the legislature then may at its will destroy the right, and adds (pp. 24, 25):

³ "Ce système, encore préconisé aujourd'hui dans certains milieux, a séduit jadis de grands penseurs comme Montesquieu et J.-B. Say. Il prête pourtant aux critiques les plus graves. Il est injuste, car il ne proportionne pas la charge au bénéfice obtenu et rejette sur les uns les dépenses qui doivent profiter aux autres: inconvénient particulièrement grave dans un pays de suffrage universel, où les dépenses publiques sont votées par des députés nommés par tous les citoyens. Il est dangereux, car, absorbant une forte portion des gros revenus, il tend à décourager l'esprit d'entreprise et le goût de l'épargne. Enfin il est arbitraire, car on ne peut déterminer rationnellement la progression susceptible d'égaliser les charges imposées à chacun."

⁴ "D'une part, la progression, livrée à elle-même, aboutit plus ou moins à la spoliation. D'autre part, si les gouvernements veulent corriger le jeu excessif de son mécanisme spontané, l'arbitraire devient la seule règle. Spoliation ou arbitraire, tels seraient donc les derniers mots de l'impôt progressif."

"Such are the possible consequences of the progressive system : the leveling of fortunes, the abolition of inheritances ; in a word, arbitrary spoliation masking itself by a tax law. * * *

"During the Revolution forced and graduated loans absorbed the whole of the incomes that were classified as superfluous ; they took fifty per cent of the 'abundant' incomes, and one hundred per cent. of the 'superfluous' incomes. Renewed on three different occasions in 1793, 1795 and 1799, these progressive loans provoked so many recriminations, so much injustice and suffering, that the renewal of public discontent which preceded the *coup d'État* of the 18th of Brumaire was attributed to a large extent to the last of these. Such are the extreme dangers which justly make us recoil before even the moderate application of the principle of progression."⁶

It is true that many writers (*e. g.*, Mill) argue that inheritance or succession taxes present different considerations, but their views when carefully considered, fail to show any sound distinction. If it be dangerous and arbitrary to impose a progressive tax on property, surely the same rule exists when imposing a progressive tax on the privilege or right of succeeding to property. In the one case we have a tax on property ; in the other a tax or excise duty on a privilege. In both cases the exaction is under the power of taxation ; and such exaction must be under equal laws impartially administered.

The extreme to which the theory of progressive inheritance taxation, if sanctioned, would shortly carry us may be seen by a bill presented to the Illinois Legislature in 1887 seeking to reform the Statutes of Descent and Wills. The object of that bill was to

⁶ " Telles sont donc les conséquences possibles du système progressif : nivellement des fortunes, abolition des héritages, en un mot, spoliation arbitraire s'abritant derrière un tarif fiscal. * * *

" Sous la Révolution, les emprunts forcés et progressifs absorbèrent la totalité des revenus qualifiés de superflu ; ils prirent 50 p. 100 des revenus *abondants* et 100 p. 100 des revenus superflus. Renouvelés à trois reprises différentes, en 1793, 1795 et 1799, ces emprunts progressifs provoquèrent tant de récriminations, d'injustices et de souffrance qu'on attribua, en grande partie, au dernier d'entre eux la recrudescence de mécontentement public qui précéda le coup d'État du 18 Brumaire. Ce sont là les dangers extrêmes qui, à juste titre, font reculer devant l'application, même modérée, du principe de la progression."

restrict the amount any person or corporation might take from a decedent and to compel the distribution of wealth or confiscate the surplus for the benefit of the state. The wife, husband or child was not to be allowed to inherit more than \$500,000, and remote relatives and others not more than \$100,000. In reference to this bill, Mr. DosPassos in his work on the Inheritance Tax Law (1st ed., p. 5) says:

“Such legislation would appear impracticable, or, at least, not consistent with the freedom of American institutions where private rights and property are concerned, though it has been endorsed by Mill, who agreed that collateral heirs should be entirely excluded.”

VIII.

SOME OF THE DECISIONS IN THE STATE COURTS RECOGNIZING THE REQUIREMENT OF EQUALITY IN THE LEVYING OF TAXES.

In the state courts, the subject of equality in taxation has been repeatedly discussed and held to mean that taxes must be levied according to some fixed rate or rule of apportionment, so that all persons shall under like circumstances pay the like rate upon similar kinds of property according to the value thereof. A reference to a few of the cases in the highest courts may be interesting. These cases recognize the just and reasonable rule, which is said to have become fundamental in our American system of taxation, that the burden of taxes shall fall equally upon all owners of the same kind of property. They

enforce the principle that the inherent and fundamental nature and character of a tax is a proportionate and equitable contribution to the support of the government; that any other exaction does not come within the legal definition of a tax; and that equality in bearing the common burden is the only sound and constitutional practice.

In *Cooley on Taxation* (2d Ed.), pp. 2-3, 169-170, the author says:

"In an exercise of the power to tax, the purpose always is, that a common burden shall be sustained by common contributions, regulated by some fixed general rule, and apportioned by the law according to some uniform ratio of equality. The power is not therefore arbitrary, but rests upon fixed principles of justice, which have for their object the protection of the taxpayer against exceptional and invidious exactions, and it is to have effect through established rules operating impartially. * *

"But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made: whether it be because of residence in a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment."

In *Davis v. Litchfield*, 145 Ill., 313, 327, the Supreme Court of Illinois said:

"It is of the essence of a tax, that it shall be levied for a public purpose, and shall be uniform in respect of persons and property within the taxing district, whether that be the State, county, municipality, or district thereof, created for local improvement, and that it be laid according to some fixed rule of apportionment. 'Equality,' says Mr. Desty (1 *Desty on Tax.*, 29), 'in the imposition of the burden, is of the very essence of the right, and though absolute equality, and absolute justice, may not be attainable, the adoption of some rule tending to

that end is indispensable. Equality, as far as practicable, and security of property against irresponsible power, are principles which underlie the power of taxation, as declared ends and principles of fundamental laws.' (Dillon on Mun. Cor., 587, and notes.)

"In the idea of a tax, it is inherent that it shall be upon some system of apportionment, securing practical uniformity among those subject to it."

In *Stuart v. Palmer*, 74 N. Y., 183, 189-190, EARL, J., said :

"A tax or assessment upon property arbitrarily imposed, without reference to some system of just apportionment, could not be upheld. * * Taxation and assessment imply apportionment. Each person must share the burdens of taxation and assessment equally with all others in like situation. * * This provision [due process of law] is the most important guaranty of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power and is a guaranty against arbitrary legislation."¹

In *Hammett v. Philadelphia*, 65 Pa. St., 146, 153, the Supreme Court of Pennsylvania said :

"The dollar which a poor man has earned by the sweat of his brow—the fortune which a rich man has inherited from his ancestors—stand on the same rock, and are surrounded and protected by the same barrier. Invested for comfort and assurance against want in sickness or old age, or cherished as a provision for widow or orphan after he has gone, it is a right which it is despotism to take from him, except for the necessary purposes of government by equal and just taxation."

And the same court in the subsequent case of *In re Washington Avenue*, 69 Pa. St., 352, 363, 364, said :

"There is a clear implication from the primary declaration of the inherent and indefeasible right of property, followed by the clauses guarding it against specific transgressions, that covers it with an ægis of protection against all unjust, unreasonable and palpably unequal exactions under any name or pretext. * * * Laws which cast the burdens of the public on a few individuals, no matter what the pretence, or how seem-

¹ See also *People v. Equitable Trust Co.*, 96 N. Y., 387, 395.

ing their analogy to constitutional enactments, are in their essence despotic and tyrannical, and it becomes the judiciary to stand firmly by the fundamental law, in defence of those general, great, and essential principles of liberty and free government, for the establishment and perpetuation of which the Constitution itself was ordained."

In re Opening of Ruan Street, 132 Penna. St., 257, 277, 279, Mr. Justice WILLIAMS said :

"These are the civil rights of the citizen of Pennsylvania as such, and they are not affected by the size of the town in which he lives, or the value of his land, any more than by the color of his skin. They are the safeguards provided by the constitution for the protection of the weak as well as the strong, the dweller in the country as well as the resident in 'cities of the first class,' and no system of classification of cities or other divisions of the state can disturb them. * * Local laws, providing different rates for different parts of the state, would be a violation of the constitution, and the duty of the courts to declare them absolutely void would be plain and imperative. So, the manner in which taxes shall be levied and collected, and at what rate, are legislative questions. Whether the law be wise or unwise, easy or severe in its operation, the courts cannot interfere, so long as it is general and uniform, but a tax of ten cents on the dollar of the last-adjusted valuation of the valuable real estate in cities of the first class, and of ten mills on the valuation of property in the rest of the state, would violate the constitution. Whether a law imposing such unjust and unequal taxes shall be executed, is a judicial question."

In Knowlton v. Supervisors of Rock County, 9 Wis., 410, 421, 422, 423, the Supreme Court of Wisconsin said :

"It was contended in argument that as those provisions fixed one uniform rate without the recorded plats and another within them, thus taxing all the property without alike, and all within alike, they do not infringe the constitution. In other words, that, for the purpose of taxation, the legislature have the right arbitrarily to divide up and classify the property of the citizens, and having done so, they do not violate the constitutional rule of uniformity, provided all the property within a given class is rated alike.

"The answer to this argument is, that it creates different rules of taxation to the number of which there is no

limit, except that fixed by legislative discretion, while the constitution establishes but one fixed, unbending, uniform rule upon the subject. It is believed that if the legislature can, by classification thus arbitrarily and without regard to value, discriminate in the same municipal corporation between personal and real property within, and personal and real property without, a recorded plat, they can also, by the same means, discriminate between lands used for one purpose and those used for another; such as lands used for growing wheat and those used for growing corn, or any other crop; meadow lands and pasture lands; cultivated and uncultivated lands; or they can classify by the description, such as odd numbered lots and blocks, and even numbered ones, or odd and even numbered sections. Personal property can be classified by its character, use or description, or as in the present case, by its *location*, and thus the *rules* of taxation may be multiplied to an extent equal in number to the different kinds, uses, descriptions and locations of real and personal property. We do not see why the system may not be carried further and the classification be made by the character, trade, profession or business of the owners. For certainly this rule of uniformity can as well be applied to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the constitution operative only to the extent of prohibiting the legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the legislature, 'you shall not discriminate between single individuals or corporations, but you may divide the citizens up into different classes as the followers of different trades, professions, or kinds of business, or as the owners of different species or descriptions of property, and legislate for one class and against another, as much as you please, provided you serve all of the favored or unfavored classes alike;' thus affording a direct and solemn constitutional sanction to a system of taxation so manifestly and grossly unjust, that it will not find an apologist anywhere, at least outside of those who are the recipients of its favors. We do not believe the framers of that instrument intended such a construction, and therefore cannot adopt it."

In *Woodbridge v. City of Detroit*, 8 Mich., 274, 301, 302, the Supreme Court of Michigan said :

"To compel individuals to contribute money or property to the use of the public without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is, it seems to me, to levy a forced con-

tribution, not a tax, duty or impost, within the sense of these terms as applied to the exercise of powers by any enlightened or responsible government."

And in the subsequent case of *The People v. Salem*, 20 Mich., 452, 474, 475, the same court said :

"Equality in the imposition of the burden is of the very essence of the power itself, and though absolute equality and absolute justice are never attainable, the adoption of some rule tending to that end is indispensable. *Weeks v. Milwaukee*, 10 Wis., 258 ; *Ryerson v. Utley*, 16 Mich., 269 ; *Merrick v. Amherst*, 12 Allen, 504.

"3. As a corollary from the preceding, if the tax is imposed upon one of the municipal subdivisions of the state only, the purpose must not only be a public purpose, as regards the people of that subdivision, but it must also be local, that is to say, the people of that municipality must have a special and peculiar interest in the object to be accomplished, which will make it just, proper and equitable that they should bear the burden, rather than the state at large, or any more considerable portion of the state. *Wells v. Weston*, 22 Mo., 384 ; *Covington v. Southgate*, 15 B. Mon., 491 ; *Morford v. Unger*, 8 Iowa, 82.

"The three principles here stated are fundamental maxims in the law of taxation. They inhere as conditions in the power to impose any taxes whatsoever, or to create any burden for which taxation is to provide ; and it is only when they are observed that the legislative department is exercising an authority over this subject which it has received from the people, and only then is that supreme legislative discretion of which the authorities speak called into action."

In *Lexington v. McQuillan's Heirs*, 9 Dana, (Ky.), 513, 517, the Supreme Court of Kentucky said :

"The distinction between constitutional taxation, and the taking of private property for public use by legislative will, may not be definable with perfect precision. But we are clearly of the opinion that, whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated, without his consent, to the benefit of the public, the exaction should not be considered as a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will, from such constituent members of the same community generally, as own the same kind of property. Taxation and representation go together. And representative responsibility is one of the chief conservative principles of our form of government. When taxes are levied,

therefore, they must be imposed on the public in whose name and for whose benefit they are required, and to whom those who impose them are responsible. And although there may be a discrimination in the subjects of taxation, still persons in the same class, and property of the same kind, must generally be subjected alike to the same common burden. This alone is *taxation*, according to our notion of constitutional taxation in Kentucky."

In *State v. Express Co.*, 60 New Hamp., 219, 236, 252, 253, 263, the Supreme Court of New Hampshire said :

"If, then, equality and justice is the basis of all constitutional taxation, a statute founded on any other principle cannot be upheld. It is true that absolute equality of taxation cannot in all cases, perhaps not in any case, be attained ; but if the inequality results from the inherent difficulty in applying the law, and not from the law itself, we cannot declare the law unconstitutional, and arrest the course of legislation.

* * * To the extent of its inequality, a disproportional division of public expense is an uncompensated and unauthorized transfer of private property, for a private purpose, from those who bear more than their shares of the common burden to those who bear less than their shares. *Morrison v. Manchester*, 58 N. H., 538, 550. * * * Under our constitution, the power to tax is a power not to destroy the right of property by a discriminating process of classification or selection, but to equitably defray the expense of protecting the right of property and other rights. * * * It [the statute under consideration] is a tax which one class of men are required to pay, and from which all others are exempt. It is a perfect example of unequal division of public expense. It does not tend towards equal right by any degree of approximation, but is as distant as possible from it, and diametrically opposite to it. It is inequality, pure and simple."

In *State v. Township of Readington*, 36 N. J. L. 66, 70, the Supreme Court of New Jersey said :

"A tax upon the persons or property of A, B and C individually, whether designated by name or in any other way, which is in excess of an equal apportionment among the persons or property of the class of persons or kind of property subject to the taxation, is, to the extent of such excess, the taking of private property for a public use without compensation. The process is one of confiscation and not of taxation."

In *Exchange Bank of Columbus v. Hines*, 3 Ohio St., 1, 15, the Supreme Court of Ohio said :

"Uniformity in taxing implies equality in the burden of taxation ; and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation."

In *Mayor v. Dargan*, 45 Ala., 310, 320, the Supreme Court of Alabama said :

"Such taxes, to make them just, must be in proportion to the value of the property upon which the burden is imposed, and they must be levied upon all, and not upon a few only. This is said to be an inherent principle of all taxation. It is the limit that use affixes to the word. If this, then, is not a tax in the just and proper sense of that word, it is a seizure of the private property of the citizen for public use, without his consent, and without first making to the owner just compensation for the same. This the Constitution of the State forbids."

The above cases have been cited to show the extent to which the state courts have gone in recognizing that the principle of equality of burden or just apportionment is of the very essence of the power of taxation itself, and that some rule tending to such equality is indispensable. Some of these cases were determined under state constitutions providing for uniformity in taxation, but nevertheless they furnish complete analogies upon the subject of taxation, in construing the fourteenth amendment and its requirement of equal laws upon every subject.

IX.

THE PROVISION EXEMPTING LEGACIES OF \$20,000 AND ESTATES FOR LIFE OR FOR A TERM OF YEARS IS ARBITRARY AND UNREASONABLE AND A LAW GRANTING SUCH EXEMPTIONS VIOLATES THE RULE OF EQUALITY.

A.

The Illinois Inheritance Law, as has been stated, exempts all near relatives whose legacies do not exceed \$20,000. Although the estate may consist of several hundred thousand dollars, any testator can avert the tax by parcelling his estate into legacies of \$20,000. The legatee receiving \$20,000 may have great wealth, but he nevertheless is entitled to the exemption. Estates for life or for a term of years in real or personal property may be of immense value and represent enormous incomes, but they are wholly exempted, if bequeathed or devised to the exempted class. The exempted class is large, and will ordinarily include many persons. An exemption of twenty involving \$400,000 would not be unusual. The greater portion of the property in the state passing to near relatives is freed from the tax. Every element which has justified exemptions in other cases is lacking in the Illinois statute.

The power of the state legislatures to grant reasonable exemptions need not be questioned. Such exemptions, however, like any other classification or regulation, must proceed "within reasonable limits and general usage" and be warranted by some public policy, and gross exemptions "especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."¹

¹ See language of Mr. Justice BRADLEY in *Bell's Gap Rd. Co. v. Pennsylvania*, 134 U. S., 232, 237

In the Illinois act the legislature has granted exemptions which exceed in amount those of any tax law ever passed.

In Massachusetts (*Minot v. Winthrop*, 162 Mass., 113, 124) the exemption is of *estates* of \$10,000, and the Supreme Court of that state thought, as expressed in the prevailing opinion, that "the exemption in the statute under consideration is certainly large as an exemption of estates." This exemption called forth the denunciation and dissent of LATHROP, J. (pp. 129-130), viz.:

"So far as I am aware, no excise tax heretofore passed in this Commonwealth has contained any exemptions. Assuming that reasonable exemptions may be allowed, it seems to me that the Legislature in the statute now before us has so far exceeded its powers that the exemptions should be considered so unreasonable, and to work so great an inequality that the act should be pronounced unconstitutional."

Thus, the Supreme Court of Massachusetts sustained an exemption which it admitted was large, but which it could not affirm was unreasonable. But what shall be said of the exemption of the Illinois act, which is not only twice as large at the very least as that of Massachusetts, but may be twenty times larger. The Massachusetts exemption is at least certain—\$10,000—no more. The \$20,000 exemption of the Illinois act is merely a minimum—the maximum will depend on the number of a decedent's legatees. The act provides that when the beneficial interests in any property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son, or husband of the daughter, or any child or children adopted as such in conformity with the laws of the state of Illinois, or to any person to whom the deceased, for not less than ten years prior to death, stood in the acknowledged

relation of a parent, or to any lineal descendant born in lawful wedlock, the tax is to be levied only upon the excess of twenty thousand dollars received by each person. As to life estates and estates for years whether of real or personal property, the exemption will represent enormous amounts. In Illinois the common law rule as to perpetuities obtains, namely, any number of lives in being with twenty-one years and the period of gestation added. Estates for years frequently are made for very long periods, such as ninety-nine years, and there is no limit thereon. What just reason can there be for exempting such estates for life and for a term of years, but taxing the devisee of the fee which may be no more valuable than a term of years.

In the other states, the exemption is small and reasonable, based on the *estate* of the decedent and ranging from \$200 in Ohio, \$250 in Pennsylvania and \$500 in Maryland, Delaware, California, Maine and New Jersey, to \$1,000 in West Virginia and Connecticut (Dos Passos Inheritance Tax Law, 2 ed., pp. 80-91), and \$2,000 in Vermont.

In New York under the act of 1892, now in force, the exemption of \$10,000 to lineals and others is upon the aggregate value of the testator's estate passing to taxable persons, whether of the lineal or collateral class, and is not affected by the size of the individual shares (*Matter of Hoffman*, 143 N. Y., 327, 331; Dos Passos, pp. 81, 139). In Michigan the exemption is \$5,000. The exemption in Wisconsin was of estates of \$3,000, and was one of the grounds upon which the court held the act unconstitutional and void, viz., that the tax was "limited to a certain class of estates" (*The State ex rel. Sanderson v. Mann*, 76 Wis., 469, 480).

Exemptions of lineals and other next of kin of the first blood will be found in the legislation of nearly all the states, and, as has been stated, this distinction between lineals and collaterals, etc., has been sustained as reasonable and equitable. If the Illinois statute had taxed only collaterals and exempted the whole class of lineals, the exemption or classification might have been sustained. But having selected lineals as a class, it is insisted that the entire class must be taxed equally; that one cannot be taxed and another exempted in the same class, and that the exemption of life estates and estates for years is wholly indefensible. If classification is unconstitutional which seeks to subject to any particular tax "all men possessed of a certain wealth,"¹ then it should be equally in conflict with the requirements of the fourteenth amendment to subject to a succession tax only those succeeding to large amounts.

The fallacy of the arguments in favor of this exemption lies in assuming that as the whole class of direct heirs may be exempted by not being classified and taxed, the greater includes the less, and that therefore any exemption, however unreasonable and unnecessary, is within the discretion of the legislature. Such an argument would justify any exemption, however gross or arbitrary.

A tax law which contains arbitrary exemptions cannot, of course, be termed equal in any sense. While the power to exempt has been stated to be of legislative discretion, yet its exercise is not untrammelled. It cannot be capricious. The exemption "cannot be sustained when special, partial and arbitrary."²

Exemption from taxation is a form of classification,

¹185 U. S., 150, 155. ² Mr. Chief Justice FULLER in *Caldwell v. Texas*, 137 U. S., 692, 698.

and its legality is capable of being tested by a similar standard of reasonableness. The reason for the existence of this power is public policy or expediency, and its exercise without reference to this reason is indefensible.

Exemptions of small amounts of property have been justified in some cases for the reason that the expense of collection would exceed the amount collected, and in other cases as relieving the needy from the burdens of government. Desty in his work on taxation (Vol. 1, p. 633), says that the policy which justifies such exemptions is that which seeks "to enable the poor man not yet a pauper to escape becoming a public burden."

In *Cooley on Taxation* (2d ed. p. 215), the author says :

"It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality ; it would lack the semblance of legitimate tax legislation."

In *Orr v. Baker*, 4 Ind., 86, 88, STUART, J., said :

"The tax from which one class of persons is exempt, is thrown as an additional burden on the other classes. To say that such is the practice of civilized nations, is not sound. It is rather an apology for a departure from principle. Under our institutions, there is no good reason why one species of property, or one class of persons, should be exempt from the common burdens which, for the common good, all ought equally to bear. Hence these exemptions, as they are contrary to common right, are not favored by the courts."

In *State v. Indianapolis*, 69 Ind., 375, 377, 378, BIDDLE, J., said :

"If the Legislature can exempt the property of widows, unmarried females, and female minors without fathers, from taxation, they can also exempt the property of widowers, unmarried males, and male minors who have no father. By the same principle, we do not see why they might not exempt the

property of students, apprentices, milliners, mantua-makers, or any other worthy individuals or classes, which might be supposed less able to bear their proportionate burdens necessary to the State's existence, than the more stalwart and wealthy. It is the use of the property for the public benefit which will authorize its exemption from taxation by law. * * *

The common burden of taxation should be regulated by a fixed general rule, apportioned and sustained by a uniform ratio of equality. Exemption from taxation should be based only on a well grounded public policy, by which all share in the benefits."

The justification for exemptions must, therefore, in any case be a rule of public policy. This may demand that property taxes should not be exacted from that class of persons whose products do not exceed the minimum of subsistence, according to a universal standard of reasonableness founded on common experience. No such reason can be applied to an exemption from a tax on legacies or inheritances of \$20,000. The recipient may already be possessed of the means of subsistence or, indeed, of great wealth. If the reason for the exemption be, from another point of view, that the cost of collecting a small amount exceeds the amount of the tax, no such reason can exempt so large a legacy as \$20,000, or the very valuable life estates and estates for years which are being constantly created, particularly in Chicago.

To state it in another form, the exemption must be to effect some public purpose. "If this salutary principle be abandoned, we unsettle the foundations of private property, and unwisely open the door for frauds and abuses of the most alarming character," (DILLON, J., in *National Bank v. Iola*, 9 Kan., 689, 702; see also *Exchange Bank v. Hines*, 3 Ohio St., 1, 13, 14; *City of New Orleans v. Fourchy*, 30 La. Ann., 910, 913; *People v. McCreery*, 34 Cal., 432, 457.)

B.

It is peculiarly the province of this Court to determine what exemptions are arbitrary and unreasonable according to established rules of law, and to interfere under the authority of the fourteenth amendment in order to prevent the inequality which must necessarily result from a tax granting large exemptions.

The precise case has never before arisen in this Court, but the existence of this right—this duty—in the supreme tribunal has been asserted in analogous cases.

The language of the cases on this point is clear and decisive. Mr. Justice HARLAN, delivering the opinion of the Court in *Mugler v. Kansas*, 123 U. S., 623, 661, says :

“There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, * * * the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. ‘To what purpose,’ it was said in *Marbury v. Madison*, 1 Cranch, 137, 176, ‘are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.’ The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.”

In *Regan v. Farmers' Loan and Trust Co.*, 154 U. S., 362, 399, referring to previous decisions, Mr. Justice BREWER said :

"These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. * * * The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

X.

NO PRECEDENT JUSTIFIES THIS ARBITRARY FORM OF
TAXATION.

A.

It has been suggested in support of progressive taxes that the United States tax during the civil war was progressive, as if this established a precedent for an unequal tax in times of peace. So, also, as to the federal tax in 1798, which was passed in anticipation of war. It would be opposed to every principle of civil and political liberty to hold these sacrifices, willingly and gladly submitted to in a time of war, as precedents for unlawful exactions in a time of peace. As Chief Justice CHASE said in *Hepburn v. Griswold*, 8 Wall., 603, 625 :

"It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent."¹

Likewise, it has been suggested that the United States is the only English-speaking nation that has not adopted the progressive principle as to inheritance taxes; but equally true is it that it is the only nation founded upon the principle of equality and a written constitution guaranteeing equal rights, and securing to every "person within its jurisdiction the equal protection of the laws." We are not living under a system of English parliamentary rule, unchecked by constitutional limitations. No student needs to be reminded that Parliament has passed many arbitrary and confiscatory laws which could never stand under the American system.

B.

If either the exemptions or the progression be invalid, both of which are essential and inseparable parts of the whole act, the law must be declared unconstitutional. It is impossible to eliminate any of these arbitrary provisions without making a new law. This is not within the judicial province. It would not be construction but legislation, and ordaining as law what the Illinois legislature might have done but has not done. (*Poindexter v. Greenhow*, 114 U. S., 270, 304; *Baldwin v. Franks*, 120 U. S., 678,

¹ See also *Magna Charta* by Thompson, p. 371.

685; *California v. Pacific R. R. Co.*, 127 U. S., 1, 29; *Pollock v. Farmers' Loan and Trust Co.*, 158 U. S., 601, 635.)

As was said by Mr. Justice MATTHEWS in *Sprague v. Thompson*, 118 U. S., 90, 94-95, an exception which cannot be rejected without assuming an act to provide what a legislature never intended must cause the whole statute to be declared invalid, viz. :

"But the insuperable difficulty with the application of that principle of construction [*i. e.*, that part of an act may be valid and part invalid] to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia, the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions."

C.

If this assumption of arbitrary power on the part of state government is now sanctioned by the Court, the time cannot be distant when the majority of the voters, unchecked and unrestrained by a constitution, will confiscate and despoil private property under the pretence of taxation and the worst follies and crimes of history will be repeated. State constitutions are being constantly changed to meet the passion, the prejudice, the expediency of the hour. The Federal Constitution alone seems likely to last, as the only stable bulwark of our rights. There could be no greater danger to our institutions than to have it now declared that progressive taxation, with all its evil tendencies, is not within the prohibition of the great amendment adopted to guarantee to all "the protection of equal laws." It is not now necessarily a question of amount: it is a question of principle. The

discrimination, already great in the pending statute, shrinks into insignificance when we contemplate that no one can conceive where the principle of progression will stop or where it will lead us. If the progression is not spoliation to-day, who knows that it may not become so to-morrow? The motto must be, *obsta principiis*.¹ We are not bound to trust to the moderation of legislatures. Is not our supreme danger that one class will vote the taxes for another class to pay? This Court can never be called upon to perform a duty of more vital and comprehensive interest to the nation than that of protecting the rights of the people against such legislative encroachment, or of preventing the adoption throughout the country of so dangerous a policy as that embodied in the Illinois Inheritance Tax Law.²

No argument is here presented tending to abridge the taxing powers of the states. It is simply urged that the power must be exercised impartially, by equal laws, for public purposes. Let each contribute his share up to the full measure of the requirements, the necessities, the emergencies of the state, even if it shall take all. Those legislating should feel the practical restraint which must come from taxing all impartially. If the power to tax thus impartially exercised lead to destruction, the plea now made is that the exaction or the destruction must be equal and not of selected individuals: that the state cannot arbitrarily discriminate against the few in favor of the many; that it cannot sacrifice or spoliage the property of one—the lowliest or the richest—for the benefit of others.

¹Mr. Justice BRADLEY in *Boyd v. United States*, 116 U. S., 616, 635.

²Commenting on these pending cases, Dr. West, an advocate of progression in taxes says, in the December number of the *North American Review*, p. 756: "On the other hand, a favorable decision will doubtless prove a powerful stimulus to the development of progressive taxation throughout the country."

The observance of the principles of equality in the past has built up a great and prosperous nation. Security of property rights and confidence in the impartial administration of the laws have been the true sources of a prosperity which is the wonder and the envy of the world. Whatever may be temporary local interest or prejudice or blindness, the people will inevitably realize that the disregard of the principle of equality is in conflict with their own vital and permanent welfare and cannot be suffered if we are to remain a free people under the rule of constitutional guaranties restraining all arbitrary and despotic exercise of the powers of government. "In this sense, the restraints on men, as well as their liberties, are to be reckoned among their rights."¹

CONCLUSION.

It is, therefore, earnestly submitted that the judgments appealed from should be reversed and the Illinois Inheritance Law declared in conflict with the guaranty of the protection of equal laws under the fourteenth amendment in that :

(1.) Progressive or graduated taxation is violative of the rule of equality and is necessarily arbitrary.

(2.) The progression or graduation provided in the act is arbitrary, unreasonable and indefensible even if the principle of progressive taxation be sustained.

(3.) The exemptions of legacies of \$20,000 and of life estates and estates for years are unreasonable and

¹ Burke's Works, Am. ed., "Reflections on the Revolution in France," Vol. III, p. 310.

arbitrarily create inequality of burden among taxpayers.

Washington, October Term, 1897.

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Of counsel for plaintiffs in error and appellant.

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APPENDIX.

TAX ON DEVISES, INHERITANCES, AND GIFTS.

An Act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same.

Approved June 15, 1895. In force July 1, 1895. L. 1895, p. 301.

§ 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: All property, real, personal and mixed which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State or, if decedent was not a resident of this State at the time of his death, which property or any part thereof shall be within this State or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor or bargainor or intended to take effect, in possession or enjoyment after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason whereof any person or body politic or corporation shall become beneficially entitled in possession or expectation to any property or income thereof, shall be, and is, subject to a tax at the rate hereinafter specified to be paid to the treasurer of the proper county for the use of the State, and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. When the beneficial interests to any property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son or the husband of the daughter, or any child or children adopted as such in conformity with the laws of the State of Illinois, or to any person to whom the deceased, for not less than ten years prior to death, stood in the acknowledged relation of a parent, or to any lineal descendant born in lawful wedlock, in every such case the rate of tax shall be one dollar on every hundred dollars of the clear market value of such property received by each person, and at and after the same rate for every less amount, provided that any estate which may be valued at a less sum than twenty thousand dollars shall not be subject to any such duty

Rate of Tax
and Classifica-
tion.

(1) Upon lineal
descendants,
parents, &c.,
one per cent.
on each share
or legacy in ex-
cess of \$20,000.

(3) Upon collateral relatives, two per cent. on each share or legacy in excess of \$2,000.

(3) Upon all others :
 3 per cent. on \$10,000 or less.
 4 per cent. on all over \$10,000 and not exceeding \$20,000.
 5 per cent. on all over \$20,000 and not exceeding \$50,000.
 6 per cent. on all over \$50,000.

or taxes, and the tax is to be levied in above cases only upon the excess of twenty thousand dollars received by each person. When the beneficial interests to any property or income therefrom shall pass to or for the use of any uncle, aunt, niece, nephew or any lineal descendant of the same, in every such case the rate of such tax shall be two dollars on every one hundred dollars of the clear market value of such property received by each person on the excess of two thousand dollars so received by each person. In all other cases the rate shall be as follows : On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount ; on all estates of ten thousand dollars and less, three dollars ; on all estates of over ten thousand dollars and not exceeding twenty thousand dollars, four dollars ; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars, and on all estates over fifty thousand dollars, six dollars : PROVIDED, that an estate in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax.

Estates for life or years.

§ 2. When any person shall bequeath or devise any property or interest therein or income therefrom to mother, father, husband, wife, brother and sister, the widow of the son, or a lineal descendant during the life or for a term of years or remainder to the collateral heir of the decedent, or to the stranger in blood or to the body politic or corporate at their decease, or on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax and the property so passing shall be appraised immediately after the death at what was the fair market value thereof at the time of the death of the decedent in the manner hereinafter provided, and after deducting therefrom the value of said life estate, or term of years, the tax transcribed by this Act on the remainder shall be immediately due and payable to the treasurer of the proper county, and, together with the interests thereon, shall be and remain a lien on said property until the same is paid : PROVIDED, that the person or persons or body politic or corporate beneficially interested in the property chargeable with said tax elect not to pay the same until they shall come into the actual possession or enjoyment of such property, or, in that case said person or persons or body politic or corporate shall give a bond to the People of the State of Illinois in the penalty three times the amount of the tax arising upon such estate with such sureties as the county judge may approve, conditioned for the payment of the said tax, and interest thereon, at such time or period as they or

their representatives may come into the actual possession or enjoyment of said property, which bond shall be filed in the office of the county clerk of the proper county: PROVIDED, FURTHER, that such person shall make a full, verified return of said property to said county judge, and file the same in his office within one year from the death of the decedent, and within that period enter into such securities and renew the same for five years.

§ 3. All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and interest at the rate of six per cent. per annum shall be charged and collected thereon for such time as said taxes is not paid: PROVIDED, that if said tax is paid within six months from the accruing thereof, interest shall not be charged or collected thereon, but a discount of five per cent. shall be allowed and deducted from said tax, and in all cases where the executors, administrators, or trustees do not pay such tax within one year from the death of the decedent, they shall be required to give a bond in the form and to the effect prescribed in section two of this act for the payment of said tax, together with interest. Tax—When payable.

§ 4. Any administrator, executor or trustee having any charge or trust in legacies or property for distribution subject to the said tax shall deduct the tax therefrom, or if the legacy or property be not money he shall collect a tax thereon upon the appraised value thereof from the legatee or person entitled to such property, and he shall not deliver or be compelled to deliver any specific legacy or property subject to tax to any person until he shall have collected the tax thereon, and whenever any such legacy shall be charged upon or payable out of real estate, the heir or devisee, before paying the same shall deduct said tax therefrom and pay the same to the executor, administrator or trustee, and the same shall remain a charge on such real estate until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that the payment of said legacies might be enforced, if, however, such legacy be given in money to any person for a limited period, he shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of his accounts to make an apportionment, if the case requires it, of the sum to be paid into his hands by such legatees, and for such further order relative thereof as the case may require. Tax—How, when and by whom payable

Powers of executors, administrators and trustees.

5. All executors, administrators and trustees shall have full power to sell so much of the property of the decedent as will enable them to pay said tax, in the same manner as they may be enabled to do by law, for the payment of duties of their testators and intestates, and the amount of said tax shall be paid as hereinafter directed.

Payment of tax—Receipt.

§ 6. Every sum of money retained by any executor, administrator, or trustee, or paid into his hands for any tax on any property, shall be paid by him within thirty days thereafter to the treasurer of the proper county, and the said treasurer or treasurers shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of said payments, one of which receipts he shall immediately send to the State Treasurer, whose duty it shall be to charge the treasurer so receiving the tax with the amount thereof, and shall seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlements of his accounts, but the executor, administrator or trustee shall not be entitled to credit in his accounts or be discharged from liability for such tax unless he shall purchase a receipt so sealed and countersigned by the treasurer and a copy thereof certified by him.

Real estate subject to tax—Duty of executors, administrators and trustees.

§ 7. Whenever any of the real estate of which any decedent may die seized shall pass to any body politic or corporate, or to any person or persons, or in trust for them, or some of them, it shall be the duty of the executor, administrator or trustee of such decedent to give information thereof in writing to the treasurer of the county where said real estate is situated, within six months after they undertake the execution of their expected duties, or if the fact be not known to them within that period, then within one month after the same shall have come to their knowledge.

Debts proved after distribution.

§ 8. Whenever debts shall be proved against the estate of the decedent after distribution of legacies from which the inheritant tax has been deducted in compliance with this act, and the legatee is required to refund any portion of the legacy, a proportion of the said tax shall be repaid to him by the executor or administrator, if the said tax has not been paid into the State or county treasury, or by the county treasurer if it has been so paid.

Transfer of stocks or loans by foreign representative.

§ 9. Whenever any foreign executor or administrator shall assign or transfer any stocks or loans in this State standing in the name of decedent, or in trust for a decedent, which shall be liable

to the said tax, such tax shall be paid to the treasury or treasurer of the proper county on the transfer thereof; otherwise the corporation forming such transfer shall become liable to pay such taxes, provided that such corporation has knowledge before such transfer that said stocks or loans are liable to such taxes.

§ 10. When any amount of said tax shall have been paid erroneously to the State treasury, it shall be lawful for him, on satisfactory proof rendered to him by said county treasurer of said erroneous payments to refund and pay to the executor, administrator or trustee, person or persons, who have paid any such tax in error, the amount of such tax so paid: PROVIDED, that all applications for the repayment of said tax shall be made within two years from the date of said payment. Tax paid in error.

§ 11. In order to fix the value of property of persons whose estate shall be subject to the payment of said tax, the county judge, on the application of any interested party, or upon his own motion, shall appoint some competent person as appraiser as often as, or whenever, occasion may require, whose duty it shall be forthwith to give such notice by mail to all persons known to have or claim an interest in such property, and to such persons as the county judge may by order direct, of the time and place he will appraise such property, and at such time and place to appraise the same at a fair market value, and for that purpose the appraiser is authorized by leave of the county judge to use subpoenas for and to compel the attendance of witnesses before him, and to take the evidence of such witnesses under oath concerning such property and the value thereof, and he shall make a report thereof and of such value in writing to said county judge, with the depositions of the witnesses examined and such other facts in relation thereto, and to said matter as said county judge may by order require to be filed in the office of the clerk of said county court, and from this report the said county judge shall forthwith use and fix the then cash value of all estates, annuities and life estates or terms of years growing out of said estate, and the tax to which the same is liable, and shall immediately give notice by mail to all parties known to be interested therein. Any person or persons dissatisfied with the appraisement or assessment may appeal therefrom to the county court of the proper county within sixty days after the making and filing of such appraisement or assessment, on paying the given security proof to the county judge to pay all costs, together with whatever taxes that shall be fixed by said court. The said appraiser shall be paid by the county treasurer Appraisement

out of any funds he may have in his hands on account of said tax, on the certificate of the county judge, at the rate of three dollars per day for every day actually and necessarily employed in said appraisement, together with his actual and necessary traveling expenses.

Misconduct of
appraiser—
penalty.

§ 12. Any appraiser appointed by this Act who shall take any fee or reward from any executor, administrator, trustee, legatee, next of kin or heir of any decedent, or from any other person liable to pay said tax or any portion thereof, shall be guilty of a misdemeanor, and upon conviction in any court having jurisdiction of misdemeanors he shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars and imprisoned not exceeding ninety days, and in addition thereto the county judge shall dismiss him from such service.

County Court—
jurisdiction.

§ 13. The county court in the county in which the real property is situated, of the decedent who was not a resident of the State, or in the county in which the deceased was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act, and the county court first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other.

Unpaid tax—
powers, prac-
tice, etc.

§ 14. If it shall appear to the county court that any tax accruing under this Act has not been paid according to law, it shall issue a summons summoning the persons interested in the property liable to the tax to appear before the court on a day certain not more than three months after the date of such summons, to show cause why said tax should not be paid. The process, practice and pleadings and the hearing and determination thereof, and the judgment in said court in such cases shall be the same as those now provided or which may hereafter be provided in probate cases in the county courts in this State and the fees and costs in such cases shall be the same as in probate cases in the county courts of this State.

Unpaid tax—
Enforcement
and collection.

§ 15. Whenever the treasurer of any county shall have reason to believe that any tax is due and unpaid under this Act, after the refusal or neglect of the person interested in the property liable to pay said tax, to pay the same, he shall notify the State's attorney of the proper county, in writing, of such refusal to pay said tax, and the State's attorney so notified, if he has proper cause to be-

lieve a tax is due and unpaid, shall prosecute the proceeding in the county court in the proper county, as provided in section 14 of this act, for the enforcement and collection of such tax, and in such case said Court shall allow as costs in the said case such fees to said attorney as he may deem reasonable.

§ 16. The county judge and county clerk of each county shall, every three months, make a statement in writing to the county treasurer of the county of the property from which, or the party from whom, he has reason to believe a tax under this act is due and unpaid. County Judge and Clerk to notify County Treasurer.

§ 17. Whenever the county judge of any county shall certify that there was probable cause for issuing a summons, and taking the proceedings specified in section 14 of this act, the State Treasurer shall pay or allow to the treasury of any county all expenses incurred for service of summons and his other lawful disbursements that has not otherwise been paid. Expenses incurred under section 14

§ 18. The Treasurer of the State shall furnish to each county judge a book in which he shall enter the returns made by appraisers, the cash value of annuities, life estates and terms of years and other property fixed by him, and the tax assessed thereon and the amounts of any receipts for payments thereon filed with him, which books shall be kept in the office of the county judge as a public record. Public records—furnished by State Treasurer.

§ 19. The treasurer of each county shall collect and pay the State Treasurer all taxes that may be due and payable under this act, who shall give him a receipt therefor, of which collection and payment he shall make a report under oath to the Auditor of Public Accounts on the first Monday in March and September of each year, stating for what estate paid, and in such form and containing such particulars as the Auditor may prescribe, and for all said taxes collected by him and not paid to the State Treasurer by the first day of October and April of each year, he shall pay interest at the rate of ten per cent. per annum. Collection and payment—Semi-annual report.

§ 20. The treasurer of each county shall be allowed to retain two per cent. on all taxes paid and accounted for by him under this act, in full for his services in collecting and paying the same, in addition to his salary or fees now allowed by law. County Treasurer's fee.

Receipt.

§ 21. Any person, or body politic or corporate shall upon the payment of the sum of fifty cents, be entitled to a receipt from the county treasurer of any county or the copy of the receipt, at his option, that may have been given by said treasurer for the payment of any tax under this act, to be sealed with the seal of his office, which receipt shall designate on what real property, if any, of which any deceased may have died seized, said tax has been paid and by whom paid, and whether or not it is in full of said tax and said receipt may be recorded in the clerk's office of said county in which the property may be situated, in the book to be kept by said clerk for such purpose.

Lien of collateral inheritance tax.

§ 22. The lien of the collateral inheritance tax shall continue until the said tax is settled and satisfied : PROVIDED, that said lien shall be limited to the property chargeable therewith : AND, PROVIDED, FURTHER, that all inheritance taxes shall be sued for within five years after they are due and legally demandable, otherwise they shall be presumed to be paid and cease to be a lien as against any purchasers of real estate.

Repeal.

§ 23. All laws or parts of laws inconsistent herewith be, and the same are hereby repealed.

nos 425, 463

U. S. Supreme Court U. S.
FILED,
JAN 24 1898
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CLERK.

Reply Br. of Harrison, Guthrie
ILLINOIS INHERITANCE TAX CASE
v Prussing for P. E.
SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.
Filed Jan. 26, 1898.
JOSEPHINE C. DRAKE *et al.*, Executors, &c.,
Plaintiffs in Error,

vs.
DANIEL H. KOCHERSPERGER, County Treasurer, &c., of
Cook County, Illinois.

No.
425.

ELIZABETH EMERSON SAWYER *et al.*, Executors, &c.,
Plaintiffs in Error,

vs.

THE SAME.

No.
463.

JESSIE NORTON TORRENCE MAGOUN,

Appellant,

vs.

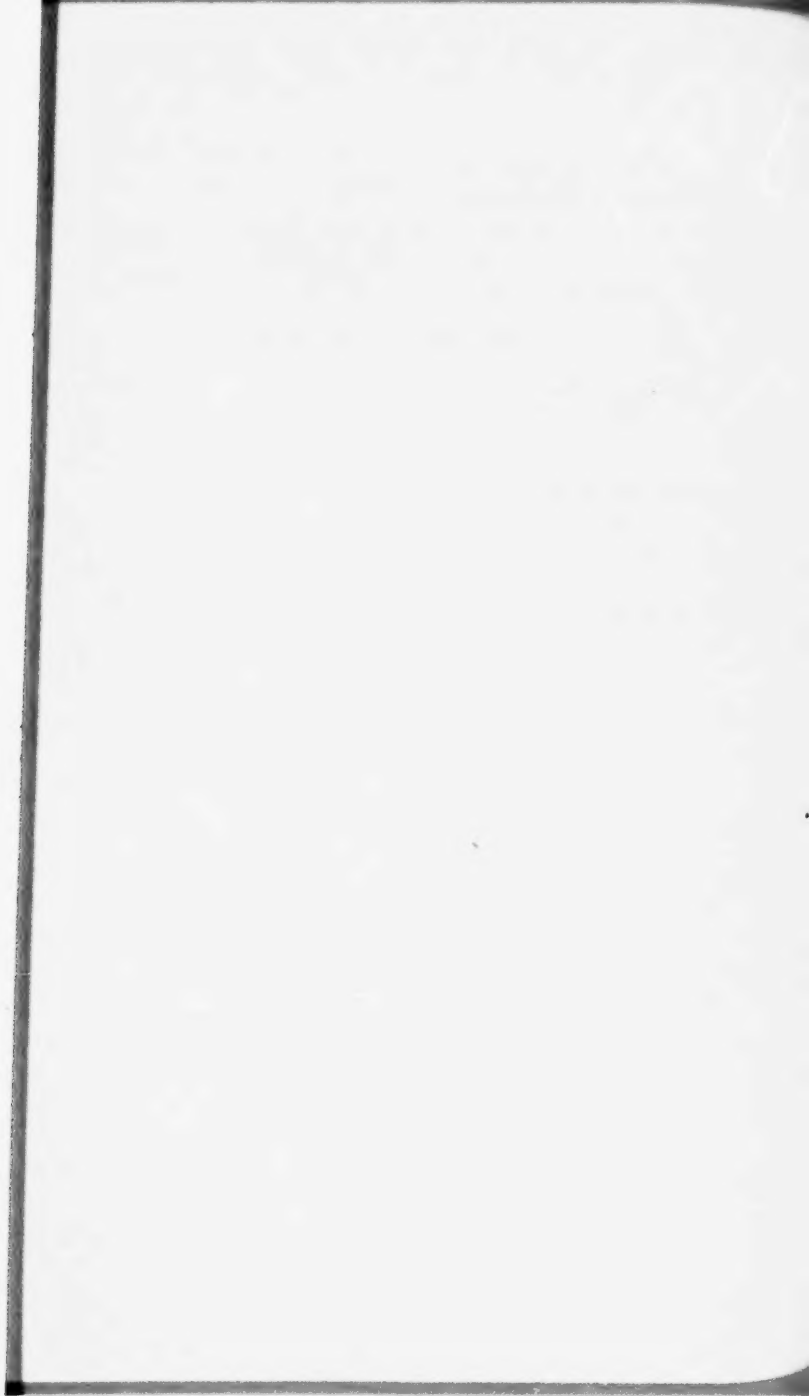
ILLINOIS TRUST AND SAVINGS BANK, as Executor, &c.,
of JOSEPH T. TORRENCE, deceased, and DANIEL H.
KOCHERSPERGER, County Treasurer, &c.

No.
464.

BRIEF OF REPLY TO ARGUMENT SUBMITTED IN SUPPORT
OF ILLINOIS INHERITANCE TAX LAW OF 1895.

BENJAMIN HARRISON,
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Of counsel for plaintiffs in error and appellant.



ILLINOIS INHERITANCE TAX CASES.

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OF ILLINOIS INHERITANCE TAX LAW OF 1895.

Replying to points submitted in the brief of defendant and appellee, it may be of aid to show :

1. That the interpretation of the act insisted upon in the opposing brief is not supported by its language or by precedent.

2. That the decisions of this court cited in the opposing brief do not sustain the propositions there submitted.

It is also deemed advisable to present at greater length than seemed necessary in preparing our principal brief the proposition that inheritance and testamentary disposition are fundamental rights which the states are compelled to recognize by the constitutional guaranty of individual property. To this end, some authorities and conclusions sustaining the following minor propositions are respectfully submitted :

3. That the rights of inheritance and testamentary disposition are not of statutory origin.

4. That frequent sanction of these rights by legislative enactment is consistent with the claim that they are natural or fundamental rights.

5. That legislative power to sanction one of these rights at the expense of the other is consistent with the claim that they are both constitutional rights.

6. That as between the state and an individual the only limitations upon these fundamental rights are governmental support and public necessity.

7. That writers who advocate the restriction of inheritance and testamentary disposition in favor of the state are not authorities in this Court.

I.

THE INTERPRETATION OF THE ACT INSISTED UPON IN THE OPPOSING BRIEF IS NOT SUPPORTED BY ITS LANGUAGE OR BY PRECEDENT.

The contention that the rate of the tax in the third class does not depend "on the estate of the person

dying possessed thereof," but on the amount received by each successor or legatee, is directly contrary to the opinion of the Supreme Court of Illinois in the *Drake* case.

It is important to observe that the language employed in respect of the first and second classes is essentially different both in form and substance from that employed in respect of the third class. In the former case the tax is imposed upon the amount received by the successor, in the latter case upon the aggregate succession to all in the class.

Thus, in the first class, "the rate of tax shall be one dollar on every hundred dollars of the clear market value of such property *received* by each person," and at the same rate for less amounts, "provided that any estate which may be valued at a less sum than twenty thousand dollars shall not be subject to any such duty or taxes, and the tax is to be levied in above cases only upon the excess of twenty thousand dollars *received* by each person." In the second class, the tax is imposed upon "the clear market value of such property received by each person on the excess of two thousand dollars so received by each person." In the third class, the tax is imposed "on all estates of ten thousand dollars and less," * * "provided, that an estate in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax."

In substance, the contention of our opponents is that for the word "estate" should be substituted the words "legacy, devise or inheritance." To quote the language of their brief: "By substituting its equivalent for the word 'estate' in such classification, all ambiguity disappears, and the intent of the legislature is clear."

This construction, it is stated, has been adopted where similar language has been employed in the tax laws of other states, and reference is made to New York and California.

An examination of the statutes of New York discloses that the language of the inheritance tax law in that state is entirely dissimilar from the language under consideration. The language of the New York law, as originally enacted in 1885,¹ compelled the construction that the exemption depended upon the amount passing to each successor and not the estate of the decedent. Said the Court of Appeals, by DANFORTH, J., in *Matter of Howe*, 112 N. Y., 100, 103 :

“ There are many other provisions of the act requiring the same construction, all tending to show that in the matter of taxation it is simply the ‘estate’ or share of the beneficiary acquired through the will or the statute of distributions, which is to be valued and the duty estimated according to its value.”

The legislature, being advised of this construction, considered that a mistake had been made in expressing its intention, and thereupon so amended the act as to make it perfectly clear that the exemption was not to be based and allowed upon the share of each successor, but was to be based and allowed upon the estate of the decedent, irrespective of the number of successors or the amount of each succession.² This is very clearly shown in *Matter of Hoffman*, 143 N. Y., 327, 330, 331, where the Court of Appeals, by FINCH, J., said of this amendment :

“ It was thus possible for a testator to avert the tax by reducing intended legacies of ten thousand dollars to lineals

¹Chap. 483, Laws of 1885, p. 820.

Chap. 399, Laws of 1893, p. 814.

to a sum slightly below that amount. * * The question first presented on this appeal, relating to a life estate bequeathed to the mother of the testatrix, and valued at less than ten thousand dollars must be decided, as it always has been in similar cases hitherto, in favor of the legatee, unless in that respect the law of 1892 has changed the necessary interpretation. But I think it has, and that such result was directly and consciously intended by the legislature."

And upon the question of exemption in the New York Act, which corresponds to the third class in the Illinois Act, the following statement of Dos Passos, Inheritance Tax Law, Second Edition, p. 139, may be quoted :

"So it has been held under the \$500 clause of the New York act of 1892 that in every case where property, real and personal, of the value of \$500 or more, passes to persons or corporations (collaterals) not exempt from taxation, the liability to tax at the rate of 5 per cent. exists, and the liability is not affected by the size of the individual shares. The property exempted under this clause is not the property passing to the legatee, which must be less than \$500 in order to entitle the same to exemption, but the amount of all property passing to legatees of the unexempted class, which must be less than \$500."

In California the language of the statute¹ was substantially as set out in the opposing brief, from which it was evident that the intention of the legislature was to grant the exemption with reference to the estate passing to the successor, and not to the estate of the decedent. The exemption in California cannot exceed \$500 to each successor ; but in Illinois the minimum is \$20,000 plus the value of estates for life or for years.

Counsel argue in their opposing brief that "to introduce the two systems of classification" would result in absurdity ; and a supposititious case is put of an estate of a million dollars, passing to children, collaterals and strangers in the following proportions, viz.:

¹Chap. 168, Stats. of 1893, p. 193.

\$750,000 to children ; \$200,000 to nephews and nieces, and \$50,000 to strangers to the blood. There is neither difficulty nor absurdity under the two systems of classification. The tax would be levied as follows :

(1.) The portion of the estate (\$750,000) passing to the children would be taxed at the rate of one per cent. after deducting the exemption of \$20,000 to each child and the value of all estates for life or for years.

(2.) The portion of the estate (\$200,000) passing to collaterals would be taxed at the rate of two per cent. after deducting the exemption of \$2,000 to each successor.

(3.) The portion of the estate passing to strangers would be taxed at the rate of five per cent.

It is submitted that the only proper and reasonable interpretation of the language of the act is that the legislature intended to create, as the Supreme Court of Illinois has held, "six classes of property" passing to successors : the first class being property passing to near relations ; the second class, property passing to near collaterals ; and the remaining four classes, property passing to distant relations and strangers depending on "the estate of one dying possessed thereof ;" and that the tax in the first and second classes is to be calculated upon the amount actually received over the exemption, while the tax in the third class is to be calculated upon the estate actually passing, irrespective of the numbers of successors in that class. The reason for the difference is, that in the first two classes the rate is uniform after deducting exemptions, while in the other classes the rate is progressive.

II.

THE DECISIONS OF THIS COURT CITED IN THE OPPOSING BRIEF DO NOT SUSTAIN THE PROPOSITIONS THERE SUBMITTED.

In *Mager v. Grima*, 8 How., 490, this Court held that the privilege of inheriting property by an alien was subject to a special tax imposed by the State of Louisiana. In the case at bar we do not contend that the State of Illinois has no power to impose a special tax upon the privilege of inheritance as enjoyed by an alien or to deny the privilege to aliens. Our contention is that the taxation of inheritances must operate uniformly upon all persons having equal rights to inherit.

United States v. Perkins, 163 U. S., 625, is cited by counsel. This Court held in that case that property bequeathed to the United States was subject to an inheritance tax under the laws of the State of New York; that the tax was upon the right to transmit, not upon the property transmitted, and therefore not open to objection as an attempt to tax the property of the United States. In the case at bar we do not contend that the State of Illinois has no power to tax the right to transmit or to succeed to property. Our contention is that this power, when exercised, must operate uniformly upon all persons whose right it is to exercise the testamentary power or to succeed to a decedent's property.

Missouri v. Lewis, 101 U. S., 22, is also cited by counsel. An examination, even the most cursory, of the features of that case and the provisions of the act there under consideration, will show that the decision has no application to the case at bar. If it is cited to sustain the proposition that, in respect of litigation, arbitrary conditions may be imposed upon persons or corporations classified according to different rules, then it

should be a sufficient answer to refer to *Gulf, Colorado & Sante Fé. R'y v. Ellis*, 165 U. S., 150, decided at the last term.

The Delaware Railroad Tax Case, 18 Wall, 206; *California v. Central Pacific Railroad Co.*, 127 U. S., 1; *Home Ins. Co. v. New York*, 134 U. S., 594, and *Monroe County Savings Bank v. City of Rochester*, 37 N. Y., 365, are cited by counsel. All these cases and many others which could be cited, including *Maine v. Grand Trunk R'y Co.*, 142 U. S., 217, involved the validity of a corporate franchise tax. In them, no other point or question was discussed by counsel or referred to by the Court. The classification of property or of rights to acquire property, for the purpose of imposing different tax rates according to the value thereof, did not arise and was not considered.

The opinions of this Court in these franchise cases pointed out that the principles which govern ordinary taxation of property or rights do not apply to taxes upon corporate franchises or special privileges; that such a franchise tax might be arbitrarily laid, no matter how much hardship or oppression was created by the amount exacted, and that there was no limitation but the discretion of the taxing power. There is, therefore, a broad and fundamental difference between a franchise tax and a tax upon property and property rights or other inherent privileges or rights which cannot be abrogated at the will of the legislature. The difference is radical and is founded in the essential nature of the thing taxed.

The power of the legislature as to corporate franchises is entirely different from the power which exists in respect of individuals. A state may deny existence to corporations; it may exclude corporations of other states; but it cannot exclude individuals of other states. A state may

say that foreign corporations shall not own any real estate or but a limited amount, and allow domestic corporations to own any amount ; yet the Illinois legislature could not say that an individual resident of New York should not own real property in Illinois or only to a limited amount. A state may limit the property or acquisitions of corporations, but it can not limit the property or acquisitions of individuals. A state having this absolute power over a corporation to deny it the right to transact business within its borders may impose such conditions as it sees fit in bestowing or withholding this privilege ; but in respect of individuals, the state can not do so, whether those individuals be residents or non-residents of the state, provided they are citizens of the United States or aliens protected by treaties. Running through all the decisions of this Court in tax cases of late years, it will be found taken as now established that there is a fundamental difference between property taxes and taxes imposed upon corporations by way of franchise taxes. In Illinois, however, even corporate franchise taxes must, under the Constitution of that state, be imposed by a law "uniform as to the class upon which it operates."

It is true that the franchise tax is properly and technically an excise tax, but it does not follow that the same rules apply to other excise taxes or duties. For example, a legislature may properly impose a tax upon the transfer of real estate, usually called a stamp duty, but essentially an excise tax, but it cannot withhold from the owner of real property the right or power to convey it. A legislature may impose a tax upon all checks, as the Federal Government did for many years, but it could never have been conceived that any legislature or that Congress had the power to deny to the people the right

to pay their debts by means of checks. A legislature may impose a tax upon the sale of any kind of personal property or upon the sale of stocks or grain or anything else, but its right to tax in these cases is not based in any sense upon the theory that it has the right to deny the right of sale, which is a part of property itself. A legislature may impose a stamp tax upon the publication of newspapers or magazines or books, but its right does not originate in any sense in a power to prevent publication. It is consequently entirely erroneous to assume that because conditions can be arbitrarily placed upon the exercise of the corporate franchise created and granted by the legislature, this same principle applies and the same arbitrary power exists in other forms of taxation.

In the case of corporations, and particularly quasi-public corporations, a state may well claim the power to prescribe a reasonable limit to the growth of the value of a special privilege which it grants for a public purpose, because the public purpose upon which alone it can be justified may require that it shall not exceed a certain value ; but under the Constitution the extent of the acquisition of property by individuals is illimitable, because it finds its justification not in a public purpose but in common right.

The large number of decisions in the state courts which are referred to by counsel may all be distinguished from the case at bar upon grounds similar to those which have been indicated as applying to the decisions of this court.

We confidently assert that, under our system of constitutional government, no legislature has the arbitrary and despotic power to deny all right of inheritance or testamentary disposition. Nor have any of the cases

cited in the opposing brief held that there was any such despotic power, although expressions to that effect, *obiter* and speculative, are to be found. No state ever attempted to exercise such a power. These expressions depend upon an erroneous statement of Blackstone. The maxim in regard to such *obiter* expressions need hardly be recalled, for in the language of Chief Justice MARSHALL, in *Cohens v. Virginia*, 6 Wheat. 264, 399, "The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." See also *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 574.

III.

THE RIGHTS OF INHERITANCE AND TESTAMENTARY DISPOSITION ARE NOT OF STATUTORY ORIGIN.

A.

As to the right of inheritance.

By the facts of legal history the right to acquire and transmit property by inheritance is shown to have existed from the beginning of law to the present time as an essential attribute of the right of property.

The origin of property is the origin of law;¹ the origin of both property and law is the origin of

¹It will hardly be contended that the right of property originated in statute law; yet—"That is property which is recognized as such by the law, and nothing else is or can be. Property and law are born and must die together. Before the laws there was no property; take away the laws, all property ceases." Cooley, *Prin. of Const. Law*, 2 ed., p. 327; Bentham, *Theory of Legislation*, 1896, p. 113. "L'esprit des lois—c'est la propriété." Lingnet, quoted in Palgrave's *Dict. Pol. Econ.*, vol. 1, p. 744.

civilized society ;¹ the transition of society from turbulence to order supplies the reason of the law creating property ;² and in the development of property rights under the law, for the same reason, the right of inheritance is included.³

The natural right of children to inherit the property of their parents was recognized by law in the earliest period of society of which we have any record.⁴ Children were regarded as having an inchoate right in their parent's property during life, not as against the parent necessarily but as against all others—a *jus ad rem* convertible by law at the parent's death into a *jus in re*.⁵ This principle is asserted by all writers of legal history to have prevailed from the beginning,⁶ and it was accorded a prominent place in the first compilations of existing law.⁷ Nowhere do we find it authoritatively denied.

¹Bigelow, Wills, 1897, advance sheets in XI Harv. L. Rev. p. 74, n. 1. "Till such right has been established there can be neither industry nor civilization." McCulloch, Succession to Prop., 1848, p. 2.

²"With the progress of law from rudeness to refinement," property rights "kept increasing in consideration and vigor." 2 Kent, Com., 14 ed., p. 325.

³Austin, in his definition of property, has taken care to include inheritance. Austin, Jurisp., Campbell's ed., vol. 2, sec. 1103. Bracton treats inheritance as one of the methods of acquiring the dominion of things. Bracton, De Legibus Angliæ, Transl. 1878, bk. 2, ch. 29, sec. 1.

⁴U. S. v. Perkins, 163 U. S., 625, 628. It has been well said that "the time when no such law existed is in strictest sense a prehistoric time." 2 Pollock and Maitland, Hist. of Eng. Law, 1895, p. 248.

⁵See Pakenham, Descent, 1766, p. 63 ; 2 Pollock and Maitland, Hist. of Eng. Law, 1895, p. 247.

⁶"It is abundantly certain that in remote ages property everywhere descended on the death of the possessor, as a matter of course, to his children or nearest of kin. It is consonant to the sense of justice that it should be so." McCulloch, Succession to Prop., 1848, p. 3. "The preference of descendants before all other kinsfolk we may call natural, that is to say, we shall find it in every system that is comparable with our own." 2 Pollock and Maitland, Hist. of Eng. Law, 1895, p. 258.

⁷"The Law of Moses gave the eldest son a double portion, and excluded the daughters entirely from the inheritance, so long as there were sons, and descendants of sons ; and when the inheritance went to the daughters in equal portions, in default of sons, they were obliged to marry in the family of their

It is true that Sir William Blackstone says: "the law of nature suggests, that, on the death of the possessor, the estate should again become common, and be open to the next occupant," but he adds: "for the sake of civil peace, by the positive law of society," it is otherwise ordered.¹ It is, therefore, apparent that Blackstone's conception of the law of nature supposes a time when no positive law existed—a period before society, when man was in a state of nature.²

Chancellor Kent's statement of the law of nature in respect of inheritance is practical, and its truth is self-evident. He regards this natural right as the offspring of the social state, not the incident of a state of nature; and its recognition by sovereignty as a legal right he regards as the inevitable result of its existence as a natural right. For he says:³

"The right to transmit property by descent, to one's own offspring, is dictated by the voice of nature. The universality of the sense of a rule or obligation, is pretty good evidence

father's tribe, in order to keep the inheritance within it." 4 Kent, Com., 14 ed., p. 376. "In the Gentoo Code, all the sons were admitted, with an extra portion to the eldest, under certain circumstances, and no attention was paid to the daughters, according to the usual and barbarous policy of the Asiatics." *Ibid.* "Under early Greek institutions, movables were divided among the children, and if none, then among the nearest relations on the father's side." *Ibid.*, p. 377, note (c). "The law of succession at Athens resembled, in some respects, that of the Jews; but the male issue took equally, and were preferred to females; and if there were no sons, then the estate went to the husbands of the daughters." *Ibid.*, p. 377. "The Law of the Twelve Tables admitted equally male and female children to the succession." *Ibid.* A rule could hardly have become so universal among both civilized and barbarous peoples unless dictated by the instinct of justice. "Where the practice is universal it is reasonable to think the cause natural." Locke, Gov., ch. 9, sec. 88,

¹ 2 Blackstone, Com., p. 13.

² "This is, of course, mere idle speculation; but it was the current view when Blackstone's treatise was published." Markby, Elements of Law, 4 ed., sec. 791. "If he and they mean, that the actual regulations of leading States, as primogeniture among the English, and the exclusion of emancipated sons and married daughters among the Romans, are not dictated by the law of nature, no one will make issue with them." P. Bliss in 3 So. L. Rev., p. 444.

³ 2 Kent, Com., 14 ed., p. 326.

that it has its foundation in natural law. It is in accordance with the sympathies and reason of all mankind, that the children of the owner of property, which he acquired and improved by his skill and industry, and by their association and labor, should have a better title to it at his death than the passing stranger. It is a continuation of the former occupancy in the members of the same family. This better title of the children has been recognized in every age and nation, and it is founded in the natural affections, which are the growth of the domestic ties, and the order of Providence."

And again :¹

"It encourages paternal improvements, cherishes filial loyalty, cements domestic society; and nature and policy have equally concurred to introduce and maintain this primary rule of inheritance, in the laws and usages of all civilized nations."²

The ancient Germans recognized and enforced as a natural right the inheritance of children; and, in case of the failure of children, the right was extended to others of the blood of the decedent.³ In the laws of the Anglo-Saxons prior to the Conquest the same rules were in force.⁴

In the Roman law, the recognition of this natural right of children to inherit produced the doctrine of family ownership of property and of the posthumous

¹4 Kent, Com., 14 ed., p. 376.

²To similar effect, see also, Christian's notes to 2 Blackstone, Com., p. 11, note 3.

³Among the ancient Germans, according to Dr. Francis S. Sullivan, "upon death the right went according to the plain dictates of nature." Lectures on Const. and Laws of England, 1895, Vol. 1, p. 108. Says the same author, quoting from Tacitus (de M. G. chs. 5 and 7): "To every man his own children were heirs and successors. For want of them, his nearest of kin, his own brothers, next his father's brothers, or his mother's." *Ibid.*, 108. "The property belonged to the family, as a sort of corporation; while the family continued, the community had nothing in the property." Bigelow, Wills, 1897, advance sheets in XI Harv. L. Rev., p. 75.

⁴The great legal antiquarian, John Selden, in 1683, says that by the laws of the Saxons an intestate's goods were to be "divided among his wife and children and the next of kin, according as to every one of them of right belongs, that is, according to the nearness of kindred, if no children or nephews from them be:

existence of decedents in the persons of their successors.¹

The recognition of rights of inheritance in land was more slow than that respecting movables; but this was so because individual property in land was not so soon a social necessity. Even in respect of land, the right of inheritance kept pace with the right of property. Exactly to the extent that individual property therein became recognized as a right, inheritance followed. No historical authority maintaining a contrary view has anywhere been found.

The evolution of property in land may be traced with great historical precision. Land was first held during the pleasure of the sovereign, afterwards for life, then again it descended to children and lineals, and finally in modern times the right of property in land has become as absolute as property in movables or personality.²

for it must, I suppose, be understood, that the succession was such, that the children excluded all their kindred." Selden, Tracts, 1683, tr. 4, pt. 2, ch. 1, p. 15. To the same effect is chapter 71 of the Laws of Canute, which say that in case of intestacy: "Let the property be distributed very justly to the wife and children and relations, to every one according to the degree that belongs to him." Stubbs, Select Charters, 1884, p. 74. In his charter to the City of London, William the Conqueror says: "I will that you enjoy all the law, which you did in the days of Edward, King, namely, the Confessor; and I will that each child shall be his father's inheritor after his days." Pakenham, Descent, 1766, p. 8; Stubbs, Select Charters, 1884, p. 83. In the most ancient book, at Westminster the following appears: "To every man, his children are the heirs and successors, and there be no testament. If there are no children, then his brothers, uncles of the father's side and uncles on the mother's side inherit." Pakenham, *Ibid.*, p. 8.

¹Maine, Ancient Law, 1864, pp. 183, 184; Holland, Elements of Jurisp., 8 Ed., 1896, 143. "The Roman heir took immediately and as of right under a title which was inchoate in the life of his ancestor. The XII. tables speak of *sui heredes*, that is, heirs of themselves or their own property." 4 Kent, Com., 14 ed., p. 441, note.

²Sullivan, Lectures on Const. & Laws of England, 1805, vol. 1, pp. 103, 109; Kent, Com. 14 ed. vol. 2, p. 326, *et seq.*; Bisset, Estates for Life, p. 1. The history of property in lands in the time of the Saxons is perspicuously stated by Sir John Dalrymple in his celebrated work on Feudal Property, 4 ed., 1758, ch. 5, sec. 1, p. 198, *et seq.* He says, p. 201, that the inheritance in land was "equally divided among all the sons."

The extension of the right of inheritance in land to collateral upon failure of lineal heirs was a natural consequence of the recognition of this right in lineals. It is plain that the principle of individual succession which gives to lineals a right of acquisition superior to collaterals or strangers, gives to collaterals a right of acquisition superior to individual strangers.¹ As the right of lineal inheritance was recognized and sanctioned by positive law long prior to the time when statutes became a source of law in the sense of that to which rights owe their existence, in precisely the same manner collateral inheritance was recognized as a natural right, and, by the sanction of positive law, became a legal right. Lord Kames in 1749 said that collateral succession is universal, "not by statute, but by custom."² Sir John Dalrymple in 1758 said that it crept into the law of Great Britain as well as into that of other European nations, "by practice, without a public ordinance."³ And the opinion is universally accepted that "the rules which govern the descent of real property are the rules of the common law."⁴

B.

As to the right of testamentary disposition.

Legal history records that testamentary disposition

¹It is not here contended that the principle of inheritance gives to collaterals a right to acquire by succession superior to that of the whole community.

²Kames, Succession or Descent, p. 159.

³Dalrymple, Feudal Property, 4 ed., ch. 5, sec. 2, p. 217.

⁴Raleigh, Law of Property, 1890, p. 119, *et seq.*, and authorities cited.

is a natural right, coeval with the right of alienation.¹ In Athens previous to the time of Solon, so far as known, "the natural heirs" could not be disinherited. The Attic laws of Solon sanctioned the testamentary right only in those who had no children.² In Rome, the XII Tables, a codification of existing laws, "conceded in terms the utmost liberty of testation."³ But the Roman testament was, for a long period, limited in its operation by the doctrine of family ownership under the institution of *patria potestas*.⁴ In the later Roman Empire, when family ownership had gradually given way to individual ownership, the testamentary right was again limited in favor of the natural heirs.⁵

¹ "The power of alienation of property is a necessary incident to the right of property." 2 Kent, Com., 14 ed., p. 326. Grotius considers disposition by will to be one of the natural rights of alienation. De Jure Belli, bk. 2, ch. 6, sec. 14. In the Bible we read that Abraham, before the birth of Isaac, contemplated leaving his possessions to his servant (Gen., c. 15, v. 3, 4); that Sarah protested against the son of Hagar being made heir with Isaac (Gen., c. 21, v. 10); that Abraham, in contemplation of death, gave gifts to the sons of his concubines (Gen., c. 25, v. 6); that Jacob gave to Joseph a double portion (Gen., c. 48, v. 22); and that the Law of Moses prohibited the disinheritance of the son of a hated wife in favor of the son of a beloved wife (Deut., c. 21, v. 16).

² McCulloch, Succession to Prop., 1848, p. 3; Maine, Ancient Law 1864, p. 191; 4 Kent, Com., 14 ed., p. 502.

³ Maine, Ancient Law, 1864, p. 210; I Jarman, Wills, 5 Am. ed., p. 146, note.

⁴ "It is certain," says Maine, "that, in the old Roman Law of Inheritance, the notion of a will or testament is inextricably mixed up, I might almost say confounded, with the theory of a man's posthumous existence in the person of his heir. * * It was at first not a mode of distributing a dead man's goods, but one among several ways of transferring the representation of the household to a new chief." Maine, Ancient Law, pp. 183, 188. And McCulloch says: "In Rome, where the paternal authority was carried to an extreme, the right of the children to succeed to the property of their father was, for a lengthened period, indefeasible, except by a will made in an assembly of the people." McCulloch, Succession to Prop., 1848, p. 3. "The gradual growth of the power to make a will, from the days when it could only be made in the 'comitia calata,' or in the face of the people drawn up in battle array, 'in procinctu,' through the twelve tables, and the praetorian relaxations, down to the wide liberty enjoyed under the later Empire, is one of the most interesting topics of the history of Roman law." Holland, Elements of Jurisp., 8 ed., p. 143.

⁵ This was accomplished by the *lex Falcidia*, which was confirmed by the *corpus juris* of Justinian. See an article by Dr. Robert C. Fergus, entitled The Influence of the Eighteenth Novel of Justinian, in VII Yale L. J., 1897, pp. 26, 67, 68, which contains also many valuable quotations showing that in nearly all the continental countries the recognition of the children's right of inheritance resulted in legal restrictions upon disinheritance.

By the common law of England there can be no doubt that the first principles established to secure the enjoyment of ownership in personal property sanctioned the testamentary right. This is stated without qualification by the best authorities.¹ Testamentary right in land, although not so soon sanctioned as that in personalty, is yet coincident with the sanction of that individual property in land which includes the power of alienation.² That the right to devise lands was freely exercised in the time of the Saxons "is a matter of which there is no question" in the pages of legal history.³

From the foregoing, it appears that the first exercise of the testamentary power was a limited one; and that its limitations are traceable to two causes only: first, the right of inheritance long before established as a law of property,⁴ and secondly, the limited extent to which property in lands was in the earliest period of law recognized and sanctioned.

¹Coke, *Litt.*, 111 b., note 138 by Hargrave; 2 Blackstone, *Com.*, 491; 4 Kent, *Com.*, 14 ed., 501-505; Robertson, *Personal Succession*, ch. 1, sec. 1, p. 5; Williams, *Executors*, 6 Am. ed., bk. 1, pt. 1, ch. 1. The Laws of Canute, A. D. 1016, 1035, made provision for the disposition of goods "if anyone depart this life intestate." Stubbs, *Select Charters*, 1884, p. 74; Selden, *Tracts*, 1683, tr. 3, ch. 5, p. 5; 2 Pollock and Maitland, *Hist. of Eng. Law*, 1895, p. 259, note 2.

²2 Kent, *Com.*, 14 ed., 326, 327. Mc Culloch, *Succession to Prop.*, 1848, p. 4; Kames, *Succession or Descent*, 1749, pp. 127, 128, note.

³Swinburne, *Descents*, 1825, p. 94. Powell, *Devises*, p. 1; Bigelow, *Wills*, 1897, advance sheets in XI Harv. L. Rev., p. 75, n. 1. For instances of Saxon devises, see Selden, *Tracts*, 1683, tr. 3, ch. 5, p. 5, *et seq.* "It seems to have been rather adopted from the remnant of the Roman laws and customs they found there, than brought from their own country." Coke, *Litt.*, III b., note 138 by Hargrave. Bigelow, *Ibid.* pp. 74, 75.

Before the progress of social civilization had reached that point where testamentary disposition became a right of property, inheritance had long been recognized as such. "Inheritance is a more ancient institution than Testamentary Succession." Maine, *Ancient Law*, 189, 190. "The principle that a man may voluntarily select the person on whom his property is to devolve after his death is of later origin than the principle of intestate succession. Such a selection had at first to be ratified by legislative authority, in order to oust the rights of relatives." Holland, *Elements Jurisp.*, 8 ed., 1896, p. 143.

The only limitation of the testamentary right in personal property in the time of the Saxons and until the reign of Henry II, was the then superior right of inheritance—the natural rights of wife and children. This proposition cannot be made plainer than by the following language of Blackstone, adopted from Glanvil, who wrote of the common law as it stood in the time of Henry II.:

"In the reign of Henry the second, a man's goods were to be divided into three equal parts : of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal ; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children ; * * if he died without either wife or issue, the whole was at his own disposal."

And Blackstone adds :

"This continued to be the law of the land at the time of *magna charta*. * * In the reign of King Edward the third, this right of the wife and children was still held to be the universal or common law ; * * and Sir Henry Finch lays it down expressly, in the reign of Charles the first, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now, by will, bequeath the whole of his goods and chattels ; though we cannot trace out when first this alteration began."¹

This has been fully accepted as being a correct statement of the facts by a number of eminent authorities, a few of which are cited below ;² and has been recently quoted with approval by this Court.³

Although the modern testamentary laws do not as a rule compel provision for children, yet this is not because they have no natural right to inherit as against strangers or the whole community or people

¹2 Blackstone, Com., p. 492.

²Fitzherbert, Nat. Brev., 1793, 122 ; McCulloch, Succession to Prop., 1848, pp. 7, 8 ; Williams, Executors, pt. 1, bk. 1, ch. 1 ; 1 Jarman, Wills, 5 Am. ed., p. 146, note ; Schouler, Wills, 1887, sec. 14.

³U. S. v. Perkins, 163 U. S., 625, 627.

at large represented by the state, but because their right is deemed to be inferior to that of the parent to dispose of his own as he will. The law, relying upon a person's sense of natural justice to provide for those of his own blood in the manner most fitting, sanctions the natural right of testamentary disposition as a consequence of the natural right of free alienation. This is pointed out by Chancellor Kent, as follows :

“The law of succession has been deemed by many speculative writers, of higher and better obligation, than the fluctuating, and oftentimes unreasonable and unnatural distributions of human will. The general interests of society, in its career of wealth and civilization, seem, however, to require, that every man should have the free enjoyment and disposition of his own property ; for it furnishes one of the strongest motives to industry and economy. The law of our nature, by placing us under the irresistible influence of the domestic affections, has sufficiently guarded against any great abuse of the power of testamentary disposition, by connecting our hopes and wishes with the fortunes of our posterity.”¹

The following language of J. R. McCulloch, in 1848, upon this principle is deserving of careful consideration :

“It is obvious, indeed, that the practice of lineal succession could not be enforced without, at the same time, prohibiting the alienation of property ; for, if a man may alienate, or dispose of his property during his lifetime, his heirs at law may be as effectually disinherited as if he were permitted to bequeath his property to others to their exclusion. The ability to alienate movable property is, however, indispensable to enable society to make any progress, or even to emerge from barbarism ; and independently of the power to alienate being essential, and of its being alike impossible to prevent its exercise, or to ascertain the motive that may lead to it, the reasonableness and propriety of those who have no near relations, or who may have been deeply indebted to strangers, transferring a part, at least, of their property to their friends and benefactors, must in no long time have become apparent.

¹ Kent, Com., 14 ed., pp. 501, 502.

Hence the principle of allowing property to be disposed of by will or testament was necessarily, though gradually and slowly, introduced." ¹

This principle was very clearly expounded by Lord Kames in 1749 as follows :

"In early times property was not much distinguished from what is now called *usufruct*. No more was conceived in property, but the limited use of the subject. But experience pointed out a more extensive idea of property. Mankind are fond of power, especially over what is their own; and it came to be considered as an unreasonable hardship, after industry bestowed in acquiring and improving a field, that the occupier should not have it in his power to dispose of it at his pleasure. The power of disposal was relished, and became law, because it was every one's interest that it should be law. And when once this power was understood, it came by degrees to be extended the utmost length it was capable of. * * Therefore, when we read of ancient laws among particular nations, introducing the power of making a testament, we must not consider these laws as bestowing peculiar privileges, but only as authorizing a practice which was the consequence of an enlarged idea of property."²

The reasons which have been given for the existence of the right of testamentary disposition clearly show it to be a natural right, the security of which is indispensable to liberty, independence and social progress. Following are some opinions of authoritative writers which further explain the views above stated. In McCulloch's *Succession to Property*, 1848, p. 11, the author says :

"By gratifying that love of power inherent in every man, the privilege of bequeathing acts as an efficient spur to industry ; makes immediate become subservient to prospective considerations ; and sets, as Blackstone has stated, 'the passions on the side of duty.' All classes feel its powerful influence. The laborer strives to increase his deposits in the savings bank ; the farmer and retail dealer become more active and enterprising; and the plans and combinations of the capitalist cease to be circumscribed by the brief duration of

¹ McCulloch, *Succession to Property*, pp. 4, 5.

² Kames, *Succession or Descent*, pp. 127, 128, note.

human life. The right to name his heir, makes him engage with ardour in undertakings, of which posterity alone can reap the full advantage. He shares by anticipation in the consideration to be enjoyed by his successors ; he is elated by their fancied distinction ; and for their sakes strives with unabated or increased anxiety to accumulate wealth far beyond the measure of his own wants and desires. The truth of these statements is too obvious to be disputed, and has been admitted by all publicists and inquirers into the history of society."

Eyre Lloyd, in *Succession Laws of Christian Countries*, p. 28, says, translating the words of the great French writer, Montalembert, written in 1857 :

"When the English wished to put the finishing stroke upon the slavery of Ireland, they passed a law in 1701 by which the freehold property of every deceased Papist should be divided equally among his children, unless the eldest became a Protestant, in which case he could become exclusive heir to the property of his father.

"When they came to repent of their long injustice towards their victim, the first act of gradual emancipation was to abrogate this law in 1778, and thus to re-establish for the Irish Papists the dignity and independence of property."

Sir Henry S. Maine, the great English jurist and antiquarian, in *Ancient Law*, 1864, p. 183, says :

"Testamentary law is the application of a principle which may be explained on a variety of philosophical hypotheses as plausible as they are gratuitous ; it is interwoven with every part of modern society, and it is defensible on the broadest grounds of general expediency."

The latest English economic authority, Professor Joseph S. Nicholson, in *Principles of Political Economy*, 1893, p. 253, says :

"The fundamental economic reason for allowing freedom of bequest as the general principle is found in the stimulus that is given to labour and saving. People will not toil and accumulate wealth for the purpose of enriching the state. The attempt to impose succession duties approaching a hundred per cent would be the greatest possible encouragement to wasteful extravagance."

IV.

FREQUENT SANCTION OF THESE RIGHTS BY LEGISLATIVE ENACTMENT IS CONSISTENT WITH THE CLAIM THAT THEY ARE NATURAL OR FUNDAMENTAL RIGHTS.

It is not sound reasoning to argue that inheritance and testamentary disposition are not fundamental property rights because a great number of public ordinances, in the history of the law, have been enacted to secure their enforcement or to regulate their enjoyment. These have been but the methods which the sovereign power was forced to employ for the sanction of recognized natural rights.¹ Constantly bearing in mind this principle, we are not reduced to the absurd necessity of reflecting upon the hardship of the command "thou shalt not steal" because no act of legislative grace had theretofore permitted the acquisition of property.² We are not called upon to question the authority of the divine decree giving the property of Zelophehad, after his death, intestate and without sons, to his daughters because no right of inheritance or testamentary disposition had been created by statute.³ We need not inquire by what authority historians say that the time when no right of inheritance existed is "in strictest sense a

¹" Some confusion has arisen from not observing that laws occasionally owe their existence as rules and their validity as laws to one and the same authority." Holland, *Elements of Jurisp.*, 8 ed., 1896, p. 50.

²" 'Thou shalt not steal' would be nonsense but for the fact of lawful property-relations." Bliss, *Sovereignty*, 1885, p. 25.

³" Then came the daughters of Zelophehad * * 2. And they stood before Moses * * saying, 3. Our father died in the wilderness * * in his own sin, and had no sons. 4. Why should the name of our father be done away from among his family, because he hath no son? Give unto us, therefore, a possession among the brethren of our father. 5. And Moses brought their cause before the Lord. 6. And the Lord spake unto Moses, saying, 7. The daughters of Zelophehad speak right: thou shalt surely give them a possession of an inheritance among their father's brethren; and thou shalt cause the inheritance of their father to pass unto them." Numbers, c. 27.

prehistoric time."¹ We do not ask why it was that the unrestricted power of bequest allowed by the XII Tables was not considered an innovation.² We are not surprised that the laws of Canute and Edward the Confessor should have provided for succession to intestate estates without first conferring the right of testamentary disposition.³ We are not lost in idle speculation upon the forces which moved William the Conqueror to declare in his charter to the City of London that "each child shall be his father's inheritor after his days;"⁴ nor do we marvel at the provisions of Magna Charta which secured inviolate the rights of inheritance and testamentary disposition.⁵ We are not finally forced to conclude that when our own Constitution said that "the citizens of each State shall be en-

¹2 Pollock & Maitland, *Hist. of Eng. Law*, 1895, p. 248.

²Maine, *Ancient Law*, p. 210. 4 Kent, *Com.*, 14 ed., p. 503. "We read how the kings of Rome, and afterward the pretors, and long before the Twelve Tables, sat in the forum to administer justice; and could it be that their decisions were arbitrary? We must believe that they were based upon well known rules, although not formally adopted. Nor can we believe that the kings of heroic Greece, sitting in judgment in the midst of their councils, were guided by no well-understood principles. The Themistes were said to be inspired, not only because of the king's priestly office, but because they responded to the divine instincts, and because the rules which guided them came from the gods." Bliss, *Sovereignty*, p. 24. "Law did not then begin to be when it was put into writing, but when it arose, that is to say, at the same moment with the mind of God." Cicero, 2 *De Legib.*, p. 4; quoted in Holland, *Elements of Jurisp.*, 8 ed., 1896, p. 31.

³Selden, *Tracts*, 1683, tr. 3, ch. 5, p. 5. Stubbs, *Select Charters*, 1884, p. 74. 2 Pollock & Maitland, *Hist. of Eng. Law*, p. 259, n. 2.

⁴Pakenham, *Descent*, 1766, p. 8; Stubbs, *Select Charters*, 1884, p. 83.

⁵Magna Charta secured the right of inheritance in respect of both real and personal property, and the right of testamentary disposition as to the latter. The necessities of feudal government at this period (A. D. 1215) were essentially inconsistent with free alienation of land, and therefore the right to devise land was not recognized. See Pakenham, *Descent*, 1766, pp. 20, 79, 80; 2 Pollock & Maitland, *Hist. of Eng. Law*, p. 354, *et seq*; Care, *English Liberties*, 6 Ed., 1774, pp. 11, 12, 18. The causes which produced *Magna Charta* were the encroachments by the kings of the Norman line upon English liberties and particularly those relating to property rights. All legal writers and historians assert that the Great Charter of Liberties and subsequent charters in confirmation thereof were Constitutional pledges to secure the principles of existing law. Pakenham, *Ibid.*, pp. 2, 7, 19; Care, *Ibid.*, p. 6; 2 Blackstone, *Law Tracts*, 1762, *Introd.*, p. 12; Thomson, *History Essay* on *Magna Charta*, 1829, pp. 164, 167.

titled to all the privileges and immunities of citizens of the several States," it meant only to secure to each person a life estate in property holden under the law by him and his heirs forever, and left the right of inheritance and testamentary disposition subject to the will of the legislatures. As Mr. Justice WASHINGTON said in *Corfield v. Coryell*, 4 Wash., 371, 380, which is referred to in the *Slaughter-House Cases*, 16 Wall, 36, 75, as the leading case on the subject:

"The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."

It matters not whether these rights be denominated natural or artificial. It is enough that they are fundamental rights of property. As such they are protected by the Constitution. And no definition of a right of inheritance or testamentary disposition, which does not either affirm or deny that it is a fundamental right of property, is entitled to consideration. The law of Moses, the XII Tables, Magna Charta, were equally constitutions with our own, in the sense of securing the natural rights of property or the inalienable rights of the individual. On these our constitutional guaranties are founded; and

in the light of the historical facts which produced them, the development of natural rights of property is traceable through several successive stages. Keeping pace with the needs of advancing civilization, we perceive the transition of property from the character of a limited usufruct to the dignity of an inheritable estate, passing first to the owner's immediate family and later to his collateral blood relations. To meet again the demands of society, the right of alienation appears and begets the right of testamentary disposition.

Certain rights of life, liberty and property were recognized as inalienable in the Declaration of Independence. Surely, the people did not then believe that rights originating in statute, or which could only be traced historically back to some statute, were excluded. They had for centuries enjoyed the right to inherit and to dispose by will. These rights had their foundations in a deep-rooted public sentiment and race instinct. Is it conceivable that they intended to allow their legislatures to escheat or confiscate their property upon the death of an owner? Did they deem it possible that all their property could be reduced to a life estate? They withheld the power of escheat and of corruption of blood from the national government; and they took away from the states the power of attainder. The people then enjoyed rights of property, and these rights, whatever their origin, they intended to preserve. Every step they took evinces their jealousy of state or national legislative power and their determination to establish a government of equal rights as they were then enjoying them.

The fourteenth amendment of the Constitution, like

other constitutional provisions, is designed to establish on a permanent basis and to nationalize certain broad principles generally recognized, which the people believed to exist as inherent and self-evident rights of free men. When these or any other of our constitutional safeguards were adopted, the people certainly did not consider and intend that the construction of the provisions should be governed and limited by the historical sources, or origin, or occasion of the existing rights from which our system of laws is derived. Nor did they contemplate that the scope of the constitutional guaranties should be controlled or narrowed by the manner in which fundamental rights (long recognized as inalienable and inherent in man among a free people) were evolved and established, either by common consent or by statute, as, from time to time in the past, our race emerged from a semi-barbarous condition, where the rights to life, liberty or property were neither recognized nor secured.

Thus, the right to make a will of real estate, or to inherit real or personal property under certain conditions may not have existed in prehistoric times or among barbarian tribes, from whom some of our unwritten law was handed down; but, ever since the establishment of the Colonies and of the United States, the people have considered that power to dispose of their property by will was as much a right as the right to buy and sell property, and not merely a privilege temporarily allowed by the state as a matter of grace. There are innumerable rights which to-day are considered inalienable rights of the individual, but which did not exist in ancient times, and were first established, or are now evidenced, only

by statute. This might be said to be true, not only of the right of individual ownership and disposition of real property, but also as to the liberty of making certain classes of contracts and as to some of our personal rights and relations. Can it be seriously argued that the states could, notwithstanding the provision against legislation depriving a man of life, liberty or property without due process of law, go back to the feudal or barbarian law on the theory that all privileges since granted were merely temporary licenses, granted by the state as a matter of grace, but subject to revocation at its will?

Laying aside the historical facts which show that the conception of property prior to the adoption of the Federal Constitution embraced inheritance and testamentary disposition, we have yet convincing evidence that the constitutional guaranty of individual property was intended to secure these two rights as essential attributes of property. The first Congress, during its first session, had occasion to consider these rights and provide for their enforcement in the organic laws of what was then known as the Northwest Territory. The provision as set out in 1 Statutes at Large, p. 51, is as follows :

" Be it ordained by the authority aforesaid, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among their children, and the descendants of a deceased child in equal parts ; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them ; And where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree ; and among collaterals, the children of a deceased brother or sister of the intestate, shall have in equal parts among them their deceased parent's share ; and there shall in no case be a distinction between kindred of the whole and half

blood ; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate."

V.

LEGISLATIVE POWER TO SANCTION ONE OF THESE RIGHTS AT THE EXPENSE OF THE OTHER IS CONSISTENT WITH THE CLAIM THAT THEY ARE BOTH CONSTITUTIONAL RIGHTS.

It is submitted that the states are compelled by the constitutional guaranty of individual property to recognize inheritance and testamentary disposition as fundamental rights of property.

These rights are, it is true, logically opposed to each other. One exercised in its fullest perfection excludes the exercise of the other ; and both can be exercised concurrently only by excluding the exercise of each *pro tanto*. But they do not for this reason cease to be fundamental rights of property. The extent of the exercise of both or either of them, and the exclusion of one, or the partial exclusion of both, by reason of the exercise of one or both, is the field of legislative discretion. The legislature may in its discretion ordain that wife and children, and such others as may properly be deemed to have natural rights of inheritance, shall inherit all the property. Thus may the testamentary right be excluded by the right of inheritance. Again, the legislature may in its discretion sanction the right to dispose of that portion which remains after suitable provision

has been made for natural heirs. Thus may the testamentary right be limited by the right of inheritance. Finally, the legislature may in its discretion sanction the testamentary right to dispose freely and entirely of all the property by will. And thus may the right of inheritance be excluded by the testamentary right.

Throughout the pages of legal history, as before shown, the recognition of these two fundamental rights is plain. And when their nature is perceived, it is not surprising that from the beginning of their existence as natural rights a struggle for superior legal sanction has been continually in progress: the natural rights of wife and children to inherit on the one hand, the natural right of a proprietor to unlimited power of disposition on the other hand. The occasional recognition or restriction by law of inheritance in favor of testamentary disposition, or *vice versa*, marks but the ascendancy of one or the other of these natural rights in the eye of the law. With this conflict, the Constitution has nothing to do. Having established the right of property beyond cavil, it has wisely left to the states the power of choosing between these two essential attributes of the right of property.

Therefore, whilst the legislature may exclude the testamentary right altogether, it can only so do by extending the right of inheritance to its furthest limit; and the utmost limit is the blood or natural ties of the decedent. It cannot exclude the natural right of testamentary disposition by according rights of inheritance to persons who have no natural right to inherit; nor can it deny the testamentary right when natural rights of inheritance do not exist. The legislature may exclude altogether the right of inheritance;

but this it may do only by the fullest recognition of the testamentary right. It cannot exclude the natural right of inheritance by according rights of inheritance to persons who have no natural right to inherit; nor can it deny the right of inheritance when the testamentary right has not been exercised.¹

VI.

AS BETWEEN THE STATE AND AN INDIVIDUAL THE ONLY LIMITATIONS UPON THESE FUNDAMENTAL RIGHTS ARE GOVERNMENTAL SUPPORT AND PUBLIC NECESSITY.

Nowhere in the history of the law do we find an instance of a sovereign right of property opposed to the rights of inheritance and testamentary disposition, except only that which has at all times been necessary for governmental or public purposes. Even during the period of feudal tyranny, sovereign ownership of lands could lay claim to no other basis than that it was necessary for governmental support. The feudal system as introduced or perfected by William the Conqueror limited the right of inheritance and destroyed the rights of alienation and devise in those lands which it

¹ "In the case of intestacy," to quote the language of the latest writer on wills, "the State acts as an intermediary, in behalf of the public welfare. It is obvious that the same was true in feudal England, when the right to make wills, admitted and practised of goods and chattels, was cut off in respect of land. Except as original source of right, with right of escheat on failure of heirs, the State was not deemed owner, resuming its own upon the death of the tenant, and then making a gift of the property to the next taker. It acted then as before, and as at the present time, as an intermediary, to see that the social fabric should not perish. The transfer made was a transfer by rightful authority or power, not the gift of an owner." Bigelow, Wills, 1897, advance sheets in XI Harv. L. Rev., pp. 72, 75.

affected.¹ This it did by taking away the right of individual property in lands and granting them out upon peculiar conditions. The performance of military services, or an agreed or customary equivalent, became an invariable condition of all feudal grants. This was the necessary foundation of feudal government. That it was an innovation or a revolution is admitted by all legal writers.²

The decline of the feudal system, through the failure of military government to meet the demands of civilization and social progress, gradually restored the natural right of property in lands which the feudal chiefs had arrogated to themselves; and the restoration of property carried with it the natural rights of inheritance, alienation and testamentary disposition.³

Upon the abolition of feudal tenure, government is no longer supported by military services, but by taxation of property.⁴ Title to lands derived from the

¹Tenure in chivalry and primogeniture were established in the place of individual property. Before the Conquest "all lands were not only free, and under no constraint whatever, but were alienable and partible at the pleasure of the Thanes or free lords, by will or other deed, as held by book or public registry under free and common socage, thence called book-land; that is to say, under general allegiance to defend the crown and kingdom." Pakenham, *Descent*, 1766, p. 6.

"With pride and respectful gratitude we now look back to Alfred and many of his institutions which have remained and flourished in spite of the Normans. * * * This violation of what would appear to be natural justice, * * * was said to be justified by the occasion, and by the then state of society. For these simple and natural ideas of property, a new one was substituted by the feudal law, that all land was held upon the terms of military service, and thus all the landed property of the country became a part of a great military establishment." King, *Law of Succession*, 1855, pp. 24, 44.

²Sullivan, *Lect. on Const. and Laws of Eng.*, vol. 1, p. 250, *et seq.*; Dalrymple, *Feudal Property*, 4 ed., 1759, ch. 5, sec. 1, pp. 203-206; King, *Law of Succession*, 1855, pp. 23, 24, 44; Wright, *Law of Tenures*, 1734, pp. 172-175; Powell, *Devises*, pp. 2, 3; Coke, *Litt.*, 111 b, note 138, by Hargrave.

³2 Kent, *Com.*, 14 ed. pp. 327, 328; Coke, *Litt.*, 111 b, note 138 by Hargrave; Windham v. Chetwynd, 1 Burr., 414, 419.

⁴There is no doubt that the purpose of the English Death Duties, first instituted in 1694 and still in force in various forms, are essentially and only taxation for governmental support. Trevor's Taxes on Succession, 1881, p. 3; Hanson's Death Duties, 1897, pt. 1, ch. 1, p. 1, *et seq.*

state is by grant to the grantee and his heirs forever. The patents of the United States are to the grantee, "his heirs or assigns."¹ If, in the case of such a grant, our opponents' doctrine of escheat were to be applied, then, in the language of Chancellor KENT,²

"It would be a heartless and a fraudulent grant, with the deadly power of *escheat* concealed in its enclosure."

The implied condition that every person shall bear his proportionate share of the burdens of government is not now, as it was in feudal times, a condition annexed to particular grants. It is one which affects all property and all persons. Mr. Justice WOODBURY has well said :³

"All the property in a state is derived from, or protected by, its government, and hence is held subject to its wants in taxation."

This condition, by its own terms, finds its necessary limitation in the needs of government ; and reason suggests and the Constitution requires that the burdens of government shall be equal.

But the peace and order of society demand that title to property shall reside somewhere, and it is pre-eminently the end of government to secure peace and order. Therefore it is that we have a rule of law which provides for the escheat of property to the state—to the whole people, no one individual having a paramount right—upon an entire failure of individual ownership.⁴ An entire absence of heritable blood in the case

¹ 1 Stat. at Large, p. 468 ; 5 Stat. at Large, p. 417.

² Goodell v. Jackson, 20 Johns. (N. Y.), 693, 708.

³ West River Bridge Co. v. Dix, 6 How., 507, 539.

⁴ Otherwise, "The property would become vacant, and, according to its value, a thing to be scrambled for. Society, the very purpose and product of the social instinct, would be pulled apart upon the death of the first man

of a person who dies intestate is the foundation of the doctrine of escheat. In the language of Chancellor Kent,¹

"Government succeeds, as of course, to the personal and real estate of the intestate, when he has no heirs or next of kin to appear and claim it; but this is for the sake of order and good policy."

And again, adverting to the universality of this principle,²

"That property should, in such cases, vest in the public, and be at the disposal of the government, is the universal law of civilized society."

Under the feudal system escheat had a different signification.³ The rights of alienation and devise having been taken away, lands escheated or reverted upon failure of such issue as the feudal grant had designated.⁴ But even this perversion of the doctrine of escheat did not apply to personal property.⁵ The needs of the feudal government did not require that all the property of a subject should escheat; although it was forfeited for treason or felony.⁶

having property enough to excite a scramble. * * The individual in the case of testacy, the State in the case of intestacy, is an intermediary." Bigelow, *Wills*, 1897, advance sheets in XI *Harv. L. Rev.*, p. 74.

¹² Kent, *Com.*, 14 ed., p. 388.

²⁴ Kent, *Com.*, 14 ed., p. 425.

³The term "escheat" is indeed a product of the feudal system. 2 Blackstone, *Com.*, p. 244; Spelman, *Feuds and Tenures*, 1723, p. 37; Coke, *Litt.*, 92 b. But in the sense in which it was originally employed there is no such thing as escheat in American law. *People v. Conklin*, 2 Hill (N. Y.), 67, 74; *Bradley v. Dwight*, 62 Howard Pr. (N. Y.), 300-302; *Wallace v. Harmstad*, 44 Pa. St., 492, 501; 4 Kent, *Com.*, 14 ed., p. 424.

⁴¹ Blackstone, *Law Tracts*, 1762, pp. 236, 237. 1 Pollock & Maitland, *Hist. of Eng. Law*, 1895, p. 332; and authorities in preceding note. "If the heirs of the tenant become extinct, there could be no one to enjoy the gift, or to return the services on which it was granted; then, too, it necessarily was resumed by the lord, and hence arose the right of escheat and reverter." Gilbert, *Law of Tenures*, *Intro.*, p. 19.

⁵"All escheats, under the English law are declared to be strictly feudal, and to import the extinction of tenure." 4 Kent, *Com.*, 14 ed., p. 423.

⁶² Blackstone, *Com.*, pp. 251, 252.

It is therefore important to observe that a construction of the doctrine of escheat which would extend its operation to all property in complete derogation of the rights of inheritance and testamentary disposition would be far in excess of the most despotic and arbitrary acts of the feudal governments. According to the view advanced by our opponents, the Federal Constitution would be impotent to give to an American citizen any better standing in this court in respect of property than was accorded a traitor or a convicted felon by the English courts in the days of chivalry. The language of Mr. Justice PATTERSON in a famous case occurring in the early history of this country¹ is directly in point :

"Every person ought to contribute his proportion for public purposes and public exigencies ; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. * * The *English* history does not furnish an instance of the kind ; the Parliament, with all their boasted omnipotence, never committed such an outrage on private property ; and if they had, it would have served only to display the dangerous nature of unlimited authority ; it would have been an exercise of power and not of right. Such an act would be a monster in legislation, and shock all mankind."

The power of the English sovereignty known as "corruption of blood" was expressly denied to the Federal Government and the power to pass bills of attainder denied to the states.² In the language of Chief Justice MARSHALL,³

"A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. * * Such a law may inflict penalties on the person, or may inflict pecun-

¹ *Vanhorne's Lessee v. Dorrance*, 2 Dall., 304, 310.

² Federal Const., art. 1, sec. 9 ; art. 3, sec. 3.

³ *Fletcher v. Peck*, 6 Cranch, 87, 188.

iary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate ? ”

VII.

WRITERS WHO ADVOCATE THE RESTRICTION OF INHERITANCE AND TESTAMENTARY DISPOSITION IN FAVOR OF THE STATE ARE NOT AUTHORITIES IN THIS COURT.

It is true a number of social and political theorists have advocated the restriction of inheritance and testamentary disposition in favor of the whole community as a just means of preventing or checking the inequalities of wealth. That some of these have enjoyed a certain reputation as thinkers is not to be denied. That they had at the time of the adoption of our Constitution, and have now, a large following amongst certain classes is equally true. But their arguments are directed against the justice and the reasonableness of the principles upon which our constitutional guaranty of a right of property is based. Their attacks upon these principles produced the occasion for the adoption of this fundamental law. They assail now the Constitution itself, but while the Constitution stands they cannot be heard in this Court. The extravagant reveries of Rousseau, Condorcet or Godwin may not be endorsed by those who deny that they are striking at the foundations of individual liberty ; but on this subject the vagaries of the most extreme socialist differ not in tendency but

merely in degree from the theories of John Stuart Mill and of the school which claims his leadership. We do not detract from the reputation of Mill by denying the application of his doctrine to our institutions. Some of his professed followers upon the general principles of economics have withheld their consent upon this point. The latest economic authority in England, Professor Nicholson, in *Principles of Political Economy*, 1893, p. 255, uses the following language :

“ He [Mill] proposes that the state should limit directly the amount received by any person, including the children, either by bequest or inheritance. But, in the present constitution of society, this is to abandon altogether the right of freedom of bequest, and, but for the eminence of the writer who makes the proposal, it is hardly worth serious consideration.”

And the same writer, in *Historical Progress and Socialism*, 1894, p. 32, after tracing the tendency of this theory towards ideal socialism, arrives at the following significant conclusion :

“ But whatever might be the final result, there is no doubt about the period of transition from the present system to the ideal. If in the meantime socialism is to be regarded as a tendency—as a guide to political action—it can only operate through increasing as rapidly and as much as possible the taxes on land and capital, and the higher forms of professional income. No better device could be imagined for checking industrial progress, as is proved by the history of every country. It would be to introduce a creeping paralysis ; and, when the time was considered ripe for taking over the land and capital, the land would be a wilderness, and the capital old iron.”

The most thoughtful and consistent of this school of political writers admit that the purpose of Mill's doctrine of state succession is, in its last analysis, to force a redistribution of wealth through the agency of legislation. Professor Seligman, the most able advocate of progressive taxation on successions in America, is

authority for this statement. He says, in *Essays on Taxation*, 1897, p. 127 :

"While there is some scientific justification for the doctrine as originally expounded, it is unquestionable that most of its defenders plant themselves squarely on the ground that it is the function of the state to check the aggregation of wealth into a few hands and to provide for the equalization of fortunes."

And, adverting to the application of this doctrine under American law, this writer in the work cited, pp. 126-128, says :

"Even in the United States some of the commonwealth laws prohibit the bequeathing of more than a certain portion of the estate to charitable or public uses when there is a child, a widow or a parent. But, as a general rule, in English-speaking countries the right of bequest is free. It is well known that inheritance is older than bequest, and that the latter system was introduced into the Roman law, not to limit inheritance, but to provide heirs in default of near relations. The modern right of free bequest is, therefore, really opposed to the older family idea of property, which takes shape in the assertion of the right of inheritance. It thus becomes a very difficult question to decide how far inheritance may be demanded, as of right. Nevertheless, it may be said that most thinkers, as well as the mass of the public, would still to-day maintain the custom of inheritance, not indeed as a natural right or as a necessary consequence of the right of private property, but simply as an institution that is on the whole socially desirable. Even Mill says of his own scheme : 'The laws of inheritance have probably several phases of improvement to go through, before ideas so far removed from present modes of thinking will be taken into serious consideration.'

* * In the United States, for instance, if regarded as a tax on property, the charge would conflict with the constitutional provision found in many commonwealths, requiring all property to be taxed equally."

And again, in respect of the application of this doctrine by the Federal Government, p. 129 :

"But since the federal government possesses no constitutional power to regulate inheritances, the federal in-

heritance tax was sustained as being neither such a regulation nor a direct tax on the land, but an excise on the right to succeed to the ownership of property."

Chancellor Kent did not fail to recognize the purpose and tendency of this doctrine. In unmistakable terms, he condemns it as attacking the foundation principles of our institutions. His language, as it appears in the Commentaries, Vol. 2, 14 ed., pp. 319, 327, 328, is as follows :

"There have been modern theorists, who have considered separate and exclusive property and inequalities of property, as the cause of injustice, and the unhappy result of government and artificial institutions. But the human society would be in a most unnatural and miserable condition, if it were possible to be instituted or reorganized upon the basis of such speculations. The sense of property is graciously bestowed on mankind, for the purpose of arousing them from sloth, and stimulating them to action ; and so long as the right of acquisition is exercised in conformity to the social relations, and the moral obligations which spring from them, it ought to be sacredly protected. The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections.

"The exclusive right of using and transferring property follows, as a natural consequence, from the perception and admission of the right itself. * *

"In England, the right of alienation of land was long checked by the oppressive restraints of the feudal system, and the doctrine of entailments. All those embarrassments have been effectually removed in this country ; and the right to acquire, to hold, to enjoy, to alien, to devise and to transmit property by inheritance, to one's descendants, in regular order and succession, is enjoyed in the fullness and perfection of the absolute right. Every individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order and the reciprocal rights of others. The state has set bounds to the acquisition of property by corporate bodies ; for the creation of those artificial persons is a matter resting in the discretion of the government, who have a right to impose such restrictions upon a gratuitous

privilege or franchise as a sense of the public interest or convenience may dictate. With the admission of this exception, the legislature has no right to limit the extent of the acquisition of property, as was suggested by some of the regulations in ancient Crete, Lacedæmon, and Athens; and has also been recommended in some modern utopian speculations. A state of equality as to property is impossible to be maintained, for it is against the laws of our nature; and if it could be reduced to practice, it would place the human race in a state of tasteless enjoyment and stupid inactivity, which would degrade the mind and destroy the happiness of social life."

CONCLUSION.

For the foregoing reasons and those set forth in the brief of the principal argument, it is earnestly submitted that the Illinois Inheritance Tax Law should be declared unconstitutional. Such a decision will not tend to lessen the taxing powers of the State of Illinois or to embarrass or cripple it in the collection of needed revenue. The Legislature can remodel the act and impose a succession tax equally and proportionately upon a fair and reasonable classification and at such rate as may be deemed necessary or expedient for the requirements of the State.

Washington, January 24, 1898.

BENJAMIN HARRISON,
WILLIAM D. GUTHRIE,
EUGENE E. PRUSSING.

Of counsel for plaintiffs in error and appellant.



FILED.

JAN 24 1898

JAMES H. MCKENNEY

No. 425, 463 & 464.

App^x to Brief of Harrison, Guthrie & Co.

Pressing for P. C.

ILLINOIS INHERITANCE TAX CASES.

Filed Jan. 24, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Nos. 425, 463, 464.

JOSEPHINE C. DRAKE *et al.*, Executors, &c.,
Plaintiffs in error,

vs.

DANIEL H. KOCHERSPERGER, County Treasurer, &c., of
Cook County, Illinois.

Error to the Supreme Court of the State of Illinois.

ELIZABETH EMERSON SAWYER *et al.*, Executors, &c.,
Plaintiffs in error,

vs.

THE SAME.

Error to the Circuit Court of the United States for the
Northern District of Illinois.

JESSIE NORTON TORRENCE MAGOUN,
Appellant,

vs.

ILLINOIS TRUST AND SAVINGS BANK, as Executor, &c.,
of JOSEPH T. TORRENCE, deceased, and DANIEL H.
KOCHERSPERGER, County Treasurer, &c.

Appeal from the Circuit Court of the United States for
the Northern District of Illinois.

OPINION OF JUDGE CARTER IN THE DRAKE CASE,
COUNTY COURT, COOK COUNTY, ILLINOIS.



COUNTY COURT, COOK COUNTY, ILLINOIS.

OPINION FILED NOVEMBER 20, 1896.

*The People ex rel. D. H. Kochersperger, County Treasurer,
In re Drake Estate.*

THE ILLINOIS LAW TAXING INHERITANCES UNCONSTITUTIONAL AND VOID.

Held, that the Illinois Law of 1895 (Hurd's Revised Statute, 1895, page 816) taxing gifts, legacies and inheritances in certain cases, and to provide for the collection of the same for the reasons stated in the opinion, is unconstitutional and void.—
[ED. CHICAGO LEGAL NEWS.]

CARTER, J.—In this case the constitutionality of an act passed by the legislature in 1895, to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same, is questioned. The act is quite lengthy, but the points discussed are found in the first section, which provides in substance that the beneficial interest to any property or the income therefrom, which shall pass by will or be transferred by deed, grant, sale or gift made in contemplation of death, to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son, or husband of the daughter, or to children adopted, shall be taxed one dollar on every one hundred dollars of the clear market value of such property received by each person and at the same rate for every less amount, provided that any estate which may be valued at a less sum than \$20,000 shall not be subject to any such duty or tax; the tax to be levied in above cases only on the excess of \$20,000 received by each person. When the beneficial interest to any property or income therefrom shall pass to or for the use of any uncle, aunt, niece, nephew or any lineal descendant of the same, the rate of tax shall be two dollars on every one hundred dollars in excess of \$2,000 received by each person. In all other cases the rate shall be as follows: on each and every one hundred dollars of the clear market value of the property and at the same rate for any less amount, on all estates of \$10,000 and less, \$3; on all estates of over \$10,000 and not exceed-

ing \$20,000, \$4 ; on all estates over \$20,000 and not exceeding \$50,000, \$5 ; on all estates over \$50,000, \$6 ; excepting in each of these cases property valued at a less sum than \$500.

When the case was presented on oral argument there was some question as to whether the County Court or Probate Court had jurisdiction of this matter, but it was finally agreed by all parties that the County Court had jurisdiction, and a reading of sections 18 and 20, article VI of the constitution, together with the decisions in *Knickerbocker v. People*, 102 Ill. 218 ; *Klokke v. Dodge*, 103 Ill. 125, and other decisions of our Supreme Court, with reference to the jurisdiction of the County and Probate Courts, would indicate that this was the correct conclusion.

The Probate Court has a special or limited jurisdiction, carved out, as it were, from the original jurisdiction of the County Court, having, in counties where it exists, a portion of the jurisdiction of the County Court, but the County Court retaining all jurisdiction which has not been specifically granted to the Probate Court, and with the rest retaining jurisdiction over proceedings for the collection of taxes and assessments.

This is the first inheritance tax law in Illinois, although an act passed by the Illinois Legislature in 1887, for the purpose of making the Cook County Probate Court self sustaining, had some of the features of a tax on inheritance. This act provided that on the grant of letters a docket fee should be paid according to the following schedule. When the estate did not exceed \$5,000, \$5 ; when the estate exceeded \$5,000, and did not exceed \$20,000, \$10 ; when the estate exceeded \$20,000 and did not exceed \$50,000, \$20 ; when the estate exceeded \$50,000 and did not exceed \$100,000, \$50 ; when the estate exceeded \$100,000 and did not exceed \$300,000, \$100 ; when the estate exceeded \$300,000, and did not exceed one million, \$250, and amounts in \$1,000,000 and upward, \$1,000. In 1891 the law was amended, making charges of \$5 for estates that did not exceed \$5,000 and \$1 for every \$1,000 additional with certain exceptions. I am informed that this law has been followed in the collection of fees in the Probate Court since 1887, and since 1891 as amended, and that the constitutionality of the act has never been contested.

While the inheritance tax law is new in Illinois, its prin-

ciples have been followed from a very early date. The origin of the tax has usually been attributed to the Romans, though there is ground for the belief that the Romans borrowed the idea from the Egyptians. During the Middle Ages the inheritance tax idea was incorporated in the Feudal Tenure. The last of the 18th century, Pitt adopted the system in England. It is now very generally in use in the countries of Europe and in all English possessions. Dos Passos on Inheritance Tax Law, Chap. 1; Max West "The Inheritance Tax," Vol. 4, No. 2, of Studies in History, Economics and Public Law, pp. 37 to 56.

In 1794 the special revenue committee of the national house of representatives recommended a system of stamp duties, including receipts for legacies. In 1797 a graded tax was levied on legacies and shares of personal estates when the amount was more than fifty dollars. This act was repealed in 1802. In 1862 a revenue act was passed which had a legacy tax graduated, from three-fourths of one per cent on lineal issue, lineal ancestors, brothers and sisters, up to five per cent on strangers to the blood, bodies politic or corporate, and collateral relatives further removed than brothers and sisters of grandfather or grandmother. This tax was payable only when the entire personal estate of the decedent exceeded \$1,000. There was also a graduated tax on probating wills, varying with the amount of the estate from fifty cents on \$2,500 to twenty dollars on an estate of \$150,000 and charging ten dollars for every additional \$50,000. United States Statutes at Large, Vol. 12, 483.

In 1864 an amendment was passed to the original revenue law, levying a succession tax on real estate. The exemptions in this were the same as in the original act. The rate of this succession tax was graded as follows: Lineal issue, lineal ancestors, brothers and sisters, one per cent; descendants of brothers and sisters, two per cent; brothers and sisters of father or mother, and descendants thereof, four per cent; brothers and sisters of grandfather and grandmother, and descendants thereof, five per cent; other collateral relatives, strangers in blood and bodies politic or corporate, six per cent; United States Statutes at Large, Vol. 13, 285, 287.

This statute as to a succession tax was decided constitutional by the Supreme Court of the United States in *Scholey*

v. *Rew*, 23 Wall. 331. After several amendments and modifications this act was entirely repealed in 1872.

Inheritance tax laws were adopted in Pennsylvania in 1826; Louisiana, 1828, repealed in 1877, re-enacted in 1894; Maryland, 1844; Delaware, 1869; New York, 1885; West Virginia, 1887; Massachusetts, Connecticut, New Jersey, Ohio and Tennessee in 1891; North Carolina in 1846, repealed in 1883; in Virginia in 1844, repealed in 1855, re-enacted in 1863 and repealed in 1884; Maine and California in 1893; Dos Passos on Inheritance Tax Law, Chap. 1; Max West, "The Inheritance Tax," *supra*, 63-94, inclusive.

In nearly all of these States there is a graded tax, the classes of beneficiaries depending upon their blood relation to the decedent. In all of these States, except Ohio, where the Supreme Courts have been called upon to pass on the constitutionality of the act, it has been upheld: *Strode v. Commonwealth*, 52 Pa. 181; *Eyre v. Jacob*, 14 Gratt. 422; *Peters v. Lynchburg*, 76 Va. 929; *Tyson v. State*, 28 Md. 577; *State v. Dalrymple*, 70 Md. 298; *State v. Hamlin*, 86 Me. 495; *Minot v. Winthrop*, 162 Mass. 113; *In re McPherson*, 104 N. Y. 310; *State v. Alston*, 94 Tenn. 674; *Pullen v. Commissioners*, 66 N. C. 361.

Inheritance taxes have been declared unconstitutional for various reasons in Wisconsin, New Hampshire, Minnesota and Ohio: *State v. Mann*, 76 Wis. 469; *State v. Gorman*, 40 Minn. 232; *Curry v. Spencer*, 61 N. H. 630; *State v. Ferris*, 41 N. E. Rep. 519, 53 O. 314.

In Minnesota and Wisconsin the laws in question levied probate taxes or duties rather than succession taxes or duties. In Wisconsin it was decided not to be a uniform tax and one of the reasons for declaring it unconstitutional was that it applied only to Milwaukee County, and therefore was special legislation. The Minnesota law had a graded fee, varying from \$10 to \$5,000 divided into twelve classes, and seemingly having little reason to support the classification. Since this decision, the constitution of Minnesota has been amended so that an inheritance tax, uniform, graded or progressive, can now be levied in that State. The reasoning in the New Hampshire decision is the only one which declares the tax unconstitutional on grounds which would apply to inheritance taxes in general. The Ohio decision, while upholding the general idea of the inheritance tax,

decided the law unconstitutional because the classification and certain exemptions did not give equal protection to all. The decisions in all these four States have a greater or less bearing on the constitutionality of the act in this State.

It is strenuously contended that the tax inheritance law in this State is in contravention of section 1 of article 9 of the constitution of 1870, which reads as follows: "The general assembly shall provide such revenue as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

In discussing the constitutionality or validity of a statute it should be remembered that all courts hesitate to interfere with legislative action. The presumption is in favor of the validity of the law. Our Supreme Court have said frequently that "every reasonable doubt must be resolved in favor of the action of the legislature and that where such doubt exists the statute must be sustained." *People v. Nelson*, 133 Ill. 565, 575.

While this is true, yet there are times when the legislature has so clearly exceeded its power that it is necessary for the courts to decide against the validity of the statute. "But there are still other cases where it is entirely possible for the legislature so clearly to exceed the bounds of due authority that we cannot doubt the right of the courts to interfere and check what can only be looked upon as ruthless extortion, provided the nature of the case is such that judicial process can afford relief. An unlimited power to make any and everything lawful which the legislature might see fit to call taxation, would be, when plainly stated, an unlimited power to plunder the citizen. Cooley on Constitutional Limitations, 4th Ed. par. 488, p. 608.

If this inheritance tax is a tax in the ordinary sense of the term, counsel argue that it is not in proportion to the value of the property, and if it is a tax on privilege, it is not uniform as to the class upon which it operates, and that the exemptions in the act are unconstitutional. Courts and law writers have frequently said that the right to succeed to property, either by will or inheritance, is entirely within legislative control ; that it is a mere privilege which can be changed or modified or repealed at the discretion of the State. 2 Kent's Com. 325 ; Dos Passos on Inheritance Tax Law, par. 2, page 6 ; Blackstone's Com., Book 2, page 10.

In the recent case of the *United States v. Perkins*, 163 U. S. 625, 628, holding the tax inheritance law of New York constitutional, Mr. Justice Brown says, in discussing the tax inheritance law, that "It is a tax, not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. * * * For the tax is not a tax upon the property itself, but upon its transmission by will or descent." *Major v. Grima*, 8 How. 493 ; *U. S. v. Fox*, 94 U. S. 315.

Some of the decisions hold that it is a tax upon the privilege of receiving, rather than a tax upon the right to dispose of property. "It must be borne in mind that the tax is not upon the property, but upon the right or privilege of acquiring it by succession. It is a condition upon which the person may take the estate of a deceased relative by inheritance, or of a testator by his will. * * * It is not a tax upon the right of alienation, but upon the privilege of receiving by inheritance, or will, or otherwise, at the death of the former owner." *State v. Alston*, 94 Tenn. 674 ; *State v. Ferris*, 53 Ohio, 314.

The statement that the right of any person to succeed to the property of a deceased person, whether by will or inheritance, is a creature of the statute law, must be held, in my judgment, to be true only within reasonable limits. The right of children and near relatives to succeed to property has been recognized so long by legislatures and courts that it has become almost to be considered as a natural right. As was said by Mr. Justice Brown in *U. S. v. Perkins*, *supra*, "The general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to

inherit property of the parents. We know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions upon its exercise as it may deem conducive to public good."

And I am not entirely clear that this natural right of children to inherit from their parents was not recognized by the common law. In discussing the statement found on page 11, Chap. 1, Book 2, of Sharswood's Blackstone, that the permanent right of property "vested in the ancestor himself was not a natural but merely a civil right," the commentator, Christian, says, as found in a footnote at the bottom of said page 11, "I cannot agree with the learned commentator that the permanent right of property vested in the ancestor himself (that is for life), was not a natural, but merely a civil right. I have endeavored to show that the notion of property is universal, and is suggested to the mind of man by reason and nature, prior to all positive institutions and civilized refinement. If the laws of the land were suspended, we should be under the same moral and natural obligation to refrain from invading each others' property as from attacking and assaulting each others' persons. I am obliged also to differ from the learned judge and all writers upon general law who maintain that children have no better claim by nature to succeed to the property of their deceased parents than strangers, and that the preference given to them originates solely in political establishments.

"I know no other criterion by which we can determine any rule or obligation to be founded in nature than its universality and by inquiring whether it is or not and has not been, in all countries and ages, agreeable to the feelings, affections, and reason of mankind. The affection of parents toward their children is the most powerful and universal principle which nature has planted in the human breast, and it cannot be conceived, even in the most savage state, that anyone is so destitute of that affection and of reason, who would not revolt at the position that a stranger has as good a right as his children to the property of the deceased parent."

This belief is so strong in the minds of all that it has been found that an inheritance tax to be paid by near relatives is much more difficult to collect than an inheritance tax to be paid by collateral relatives and strangers. Then, too, the limiting of this right by the legislature must be reasonable.

The tax on the right to receive cannot be so great as to practically amount to confiscation of the property. The State "cannot impose a tax which shall be equivalent, or almost equivalent, to the value of the property, and can not so limit the persons who take as heirs, devisees, distributees or legatees, that the great mass of all the property of the inhabitants must become vested in the commonwealth. * * * This right must be exercised in a reasonable way." *Minot v. Winthrop*, 162 Mass. 113, 117.

However this tax may have been variously defined, it is considered by all the courts who have upheld its constitutionality as nothing more than a burden, *bonus*, duty, assessment or excise levied by the government upon the devolution, transmission, passing or privilege of transmitting or receiving property under wills and intestate laws: *Minot v. Winthrop*, 162 Mass. 113; *Strode v. Commonwealth*, 52 Pa. 181; *Eyre v. Jacob*, 14 Grat. 431; *Schoolfeld v. Lynchburg*, 78 Va. 366; *State v. Dalrymple*, 70 Md. 298; *Scholey v. Rew*, 90 U. S. 331; *In re Meriam's Est.*, 141 N. Y. 479; *State v. Hamlin*, 86 Me. 495.

Other constitutional objections have been urged against this law, but the principal point made against it, as in all the other States where the constitutionality of the tax inheritance law has been contested, is the lack of equality and uniformity. The constitutions of the other States in which the courts have passed on the tax inheritance law, nearly all contain provisions requiring equality and uniformity as to taxation, very similar to those in the constitution of this State.

There has been much discussion by the courts as to the meaning of the word "uniform." The United States Supreme Court has been called upon to give a construction to this word under the clause "all duties, imposts and excises shall be uniform throughout the United States:" Article 1, section 8, U. S. Constitution. In the income tax decisions counsel on both sides argued at great length with reference to the meaning of this word; those who advocated the constitutionality of the income tax, claiming that "the rule of uniformity in the Federal constitution is geographical in character and means that the taxes must be the same in each State that they are in every other State." On the other side counsel contended that the word not only required geographical uniformity, but that the citizens respectively of all States should

be taxed by a uniform rule. In the head money cases, 112 U. S. 580, the constitutionality of the act of August 3, 1882, was questioned because in levying "a duty of fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sailing vessel from a foreign port to any port within the United States," they claimed that the tax was not uniform because it discriminated between transporters by sea and transporters by land. Mr. Justice Miller said in that case, p. 594, "the uniformity here described has reference to the various localities in which the tax is intended to operate. 'It shall be uniform throughout the United States.' The tax is uniform and operates with the same force and effect in every place where the subject of it is found."

Mr. Justice Miller, in his lectures on the constitution, page 240, 241, has said on this same subject, referring to duties, excises and imposts, "they are not required to be uniform as between different articles that are taxed, but uniform between the different places and different States. Whisky, for instance, shall not be taxed any higher in the State of Illinois or Kentucky, where much more of the article is produced, than it is in Pennsylvania. The tax must be uniform on the particular article, and it is uniform in the meaning of the constitutional requirements if it is made to bear the same percentage over all the United States. That is manifestly the meaning of this word as used in this clause. The framers of the constitution could not have meant to say that the government, in raising its revenue, should not be allowed to discriminate between the articles which it should tax." *Bell's Gap R. R. Co. v. Pa.*, 134 U. S. 232, 237.

In the railroad tax cases, 13 Fed. Rep. 773, Mr. Justice Sawyer in a concurring opinion says. "Classification should have reference to the different character, situation and circumstances of the property, making a different form or mode of taxation proper if not absolutely necessary. It can not be arbitrarily made with mere reference to the nationality, color or character of the owners, whether natural or artificial persons, without any reference to a difference in character, situation or circumstances of the property."

Mr. Justice Lamar, in the case of *Pacific Express Co. v. Seibert*, 142 U. S. 339, 351, says, "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of

property selected, either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation and that a system which imposes a tax upon every species of property, irrespective of its nature and class, will be destructive to the principle of uniformity and equality of taxation and of a just adaptation of property to its burdens."

In the income tax cases the Supreme Court did not decide the law with reference to this question of uniformity, although it may be inferred from their first opinion that the court was evenly divided on the construction to be put upon this word, as presented in that case.

It is evident from these decisions that the United States Supreme Court has never held that the constitution specifically provided a classification of property for taxation, subjecting one kind of property to one rate of taxation and another kind of property to a different rate; while this is true these cases also show that it was possible to distinguish between franchises, licenses, privileges, and visible and tangible property, and between real and personal property; but that property could be classified by putting articles of the same kind and in the same condition and used for the same purpose in the same class, and then all in a given class must be taxed by a uniform rule without regard to its ownership.

This doctrine of classification, which is not found in any place in the United States constitution, except as that construction has been given by the court to the word "uniform," has been provided for in terms in the last part of section 1 of article IX of the constitution of Illinois, by stating that all taxes on privileges, etc., shall be levied in such manner as the general assembly "shall from time to time direct by general law, uniform as to the class upon which it operates."

This principle of uniformity runs through all legislation and all decisions in this State with reference to taxes. The United States, by the decisions of the courts, has decided that the taxation must be uniform in its operation upon all of the same class. Our State has prescribed that rule in the constitution. Does this law contain provisions which are not in harmony with this section of the constitution and this principle of taxation? It is insisted that the class division of this law is unjust and discriminating and that there are exemptions in the law that are not at all consistent with the spirit of our constitution and

with the decisions of this State. In order to find whether this be true or not, it is necessary to refer at some length to the decisions of our Supreme Court bearing upon this question.

In the case of *People v. Thurber*, 13 Ill. 554, it was held that charging three per cent on the amount of premiums charged by the agent of insurance companies, to be paid over to the county clerk and by him paid into the State treasury, was not in violation of the constitution, which provided that all taxation should be by a valuation of property to be taxed, and should be uniform; and that there was no impropriety in compelling each one to contribute in proportion to the amount of business done or money received, and that a license was not a tax in the constitutional sense of the term.

In *City of East St. Louis v. Wehrung*, 46 Ill. 392, it was stated in discussing the dram shop license question that "An ordinance which merely discriminates between different localities in a city, according to the advantages they may present for the business for which license is sought, leaving all persons at equal liberty to apply for license in whatever locality they think proper, and making no distinction between persons, but between places only, is open to no objection. Such an ordinance would be founded on the self-evident fact that a business may be conducted with much more profit in some streets of a town than in others, and the privilege, therefore, more valuable."

In *Walker v. City of Springfield*, 94 Ill. 364, 374, it was held that the power to charge a license fee on foreign insurance companies transacting business in a State was not in contravention of this section of the constitution. That it was not a tax and that the first section related only to taxes, but states that even if it was a tax, "the 30th section of the insurance law is general, and operates uniformly on the class to which it applies. And it undeniably applies uniformly to all, making no exceptions in favor of or against any one of them." See also *Wiggins v. Chicago*, 68 Ill. 372; *Chicago v. Bartee*, 100 Ill. 57; *Howland v. City of Chicago*, 108 Ill. 496; *Braun v. Chicago*, 110 Ill. 186; *Kinsley v. City of Chicago*, 124 Ill. 359.

The Dram Shop Act passed in 1883, by which cities, towns and villages are prohibited from granting licenses for the keeping of dram shops except on payment of a sum not less than at the rate of five hundred dollars per annum or not less

than one hundred and fifty dollars per annum when the license is for the sale of malt liquors only, was contested on the ground of its constitutionality, and the Supreme Court said in *Timm v. Harrison*, 109 Ill. 600, in discussing whether the act in question was in conflict with section 1 of article IX of the constitution, because the money payment required was not uniform as to the class upon which it operates, "it is insisted that the money required to be paid is for revenue and is a tax within the intent and meaning of the constitution; that the class named in the constitution is liquor-dealers; that the act in question imposes a minimum tax of one hundred and fifty dollars on venders of malt liquors and five hundred dollars on venders of other intoxicating liquors, and it is therefore not uniform on the class upon which it operates, and hence is unconstitutional. Conceding, for the purpose of the argument, that the license fee exacted by the act in question is a tax within the meaning of the constitution, we are of the opinion that the act is not in conflict with the rule of uniformity as to the class upon which it operates. The term 'liquor dealers,' used in the section above of the constitution is, as we regard, used in a generic sense. There may be different classes and varieties included under the general description 'liquor dealers,' and we think it is competent for the general assembly to classify the different kinds of liquor dealers included in the general description as used in the constitution, and impose differential taxes upon such classes—that the rule of uniformity in taxation would not be violated so long as the tax imposed is the same upon all members of the particular class. The line of division into classes here made, based upon the sale of malt liquors as distinguished from more intoxicating drinks, if viewed as for taxation, is a quite natural and a reasonable one, and not out of harmony, in our view, with any feature of the constitution in respect of taxation." To the same effect also is the case of the *U. S. Distilling Company v. City of Chicago*, 112 Ill. 19.

In the case of *Dennehy v. City of Chicago*, 120 Ill. 627, the Supreme Court decided that a city or village incorporated under the town law, had the power not only to license dram shops to sell intoxicating liquors at retail, but also the further power to exact a license for the sale of liquors in larger quantities than one gallon, classifying such license as a license

for wholesale liquor dealers, as distinguished from the dram shop license.

In the case of *The City of Cairo v. Feuchter*, 159 Ill. 155, it was held that a city ordinance which provided that every person or persons selling or giving away intoxicating liquors, malt, vinous, mixed or fermented liquors, within the limits of the city of Cairo, in quantities of five gallons or more, should be deemed a wholesale liquor dealer, and that every wholesale liquor dealer should pay the sum of one hundred dollars a year for a license, but that this ordinance would not apply to a person or persons who hold a valid license for the sale of liquors in less quantities than one gallon, was unjust, unreasonable and void. The Supreme Court say: "The power of the city to classify is not denied, but we are of the opinion that the ordinance in question makes an unjust discrimination between persons coming within the same class, and imposes burdens on some from which others are, by its terms, exempted, and that the ordinance is therefore void.

All of the decisions in Illinois which I have cited on this question, except the last, are held not to be in conflict with section 1 of article IX of the constitution, because a license fee was not a tax. Some of the decisions, as *Walker v. Springfield*, *supra*, *Timm v. Harrison*, *supra*, and *Dennehy v. Chicago*, *supra*, discuss the license fee as a tax and say that even if it be a tax it is uniform as to the class upon which it operates. In the case of *City of Cairo v. Feuchter*, *supra*, the decision seems to have been written as if the license fee provided for in the ordinance was a tax within the meaning of this section of the constitution.

Because of the distinction that the Supreme Court has made between a license fee and a tax within the meaning of the constitution, these decisions are not as decisive on the statute here in question as they otherwise would be, but the reasoning in some of them can be applied to the case at bar.

An act was passed by the legislature of this State in 1823, dividing the lands to be assessed into three classes, and fixing the valuation at \$2, \$3 and \$4, respectively. In *Reinhart v. Schuyler*, 2 Gilm. 473, it was decided that such a law was not unconstitutional as in contravention of the idea of uniformity provided for. As this method of taxation by classification had been acquiesced in for years, any other decision would have been very disastrous to titles and doubtless should not be con-

strued as of as much force on this point as if the decision had been rendered upon the constitutionality of the law immediately after it was passed.

In the case of *Porter et al. v. R. R. I. & St. L. R. R. Co.*, 76 Ill. 561, the constitutionality of the law of 1872 for taxing railroad corporations was questioned, and it was insisted that in assessing the capital stock and franchise, a different rule was adopted than applied to other property. The Supreme Court say, page 579: "It surely can not be doubted that the requirement that the board of equalization shall ascertain and determine the fair cash value of the capital stock, including the franchise of all companies and associations now or hereafter created under the laws of this State over and above the assessed value of the tangible property of such company or association, is a general law, or that it is uniform as to the class, upon which it operates. It is not restricted to any particular part of the State, nor is it limited to a special tax; it extends to the entire State for the purpose of general taxation, and it applies the same rule to all within the same class upon which it operates. * * * It is only required that they (corporations) shall be taxed in such manner as the general assembly shall from time to time direct by general law, and the only uniformity required is as to the class upon which such general law shall operate."

In the case of *Coal Run Coal Company v. Finlen*, 124 Ill. 666, 670, the Supreme Court say: "The section of the constitution undoubtedly requires the law the general assembly may enact, to be a general law, and uniform as to the class upon which it operates; but this does not prohibit the legislature from classifying the corporations for taxation. We see nothing in the constitution which prohibits the legislature from providing one method for determining the value of the capital stock, including the franchise, of a railroad company, another method for a mining corporation, and still another for manufacturing corporations. We see no clause in the constitution which prohibits the legislature from placing certain specified corporations in one class, and providing a uniform method of assessment for that class, and placing certain other specified corporations in another class, and providing a uniform manner of assessment for that class. There is no language whatever used in the clause of the constitution which forbids the legislature from forming a class, and

after the class is formed, it is declared that the general assembly shall have power to tax corporations owning franchises, in such manner as it shall direct." See also *Ottawa Gas Light & Coke Co. v. Downey*, 127 Ill. 201; *Sterling Gas Co. v. Higbee*, 134 Ill. 557.

It must be kept in mind in discussing this question that the power of the legislature over the subject of taxation is unbounded, except as limitations may be prescribed by the constitution. The constitution is not a delegation of a power to tax, but is a restriction on that power. *Du Page Co. v. Jenks*, 65 Ill. 277; *Eurigh v. People*, 79 Ill. 214; *State v. Ferris*, 53 Ohio, 314; *In re McPherson*, 104 N. Y. 306.

Some of the courts, in the decisions on the constitutionality of a tax inheritance law, have stated that it was not an ordinary tax and that it was not in contravention of the constitution where those decisions were rendered, because it was in the nature of a special tax or duty, or more exactly, an excise, not falling within a regular annual tax on property, being only occasional and exceptional, and was therefore not contemplated and provided for and guarded by the constitutional provisions or limitations with reference to the equality or uniformity of taxation. *State v. Hamlin*, 86 Me. 495, 501; *Dos Passos on Inheritance Tax Law*, page 47, par. 18.

While it is not entirely clear to my mind that sections 1, 2 and 3 of article IX of our constitution cover the entire range of all property of every kind and nature to be taxed, and of all kinds of taxes, whether general or special, excises or duties, yet I am of the opinion, from the wording of the last part of section 1, that the reference to taxes on privileges being uniform as to the class, in view of the definition of a tax on inheritance, as given by all of the courts and text writers who have defined this tax, that a tax on inheritance in this State should be held to come under the head of a tax on privilege as provided for in section 1 of article IX, and that therefore the tax must be by "general law, uniform as to the class upon which it operates." *Loan & Homestead v. Keith*, 153 Ill. 609; *Timm v. Harrison*, *supra*; *Cairo v. Feuchter*, *supra*.

Who has the power of classifying? Who shall say whether one person or corporation belongs to one class or to another class? It is evident from the decisions from which we have

quoted that this power rests with the legislature in the first instance. "There is no language used in the clause of the constitution which forbids the legislature from forming a class. * * * What object the general assembly may have had in placing mining corporations in one class for assessment, and corporations organized for manufacturing, printing or for the breeding of stock in another class, is not for us to inquire. So long as the statute does not conflict with the organic law, it will be upheld, whether wise or unwise." *Coal Run Coal Co. v. Finlen*, 124 Ill. 671.

Does our Supreme Court mean to say that in no instance the court shall interfere to decide as to classification? That the sole power rests with the legislature and cannot be reviewed by the courts, no matter how arbitrary, unreasonable or capricious the classification may be? I do not think this is a fair deduction from all of the decisions in this and other States. The only inference that can be drawn from the *Timm v. Harrison*, *supra*, and *Cairo v. Feuchter*, *supra*, is that the division must be reasonable.

In the case of *Commonwealth v. Delaware Div. Canal Co.*, 123 Pa. 594, 620, Mr. Justice Clark says: "It may be conceded, however, that classification should be made according to some reasonable, practical rule, which would prevent a gross inequality in the burden of taxation. It must visit all alike in a reasonable, practical way, of which the legislature may judge, but within the just limits of what is taxation. Like the rain it must fall upon all the people in districts and by turns, but still it must be public in its purpose and reasonable, just and equal in its distribution, and can not sacrifice individual right by palpably unjust exaction." *Commonwealth v. Brewing, Co.*, 145 Pa. 83, 86.

The legislature can divide, for the purpose of taxing, into such classes as they may deem wise, provided that the classification adopted shall not be arbitrarily founded upon mere whim or caprice, but the classification must be such that it can be referred to some considerations of public policy. Whenever the legislature creates a class for the purpose of taxation, and bases the classification on grounds and reasons which are public in their nature, the classification being natural and reasonable, even though it be one upon which legislators might honestly differ, some claiming it wise and others unwise, in such a case the courts can not interfere with the classifica-

tion. But if it is purely arbitrary and justified by no public purpose, then, if the evil arising from such classification is of any magnitude, under all decisions it is the duty of the court to interfere.

It is urged that the classification in this inheritance tax law is unreasonable and arbitrary, in that it places father, mother, husband, wife, children, brother, sister, etc., in one class; uncle, aunt, niece, nephew, in another class and all others in a third class, and that this third class is arbitrarily divided not as to persons composing the various classes, but as to the amount of money the persons are to receive. It is also urged that the exemptions in the first and second classes are unreasonable and arbitrary; that if you do not call the \$20,000 an exemption, then the first class is subdivided into two classes and that this division is unfair. The same argument is made as to the \$2,000 exemption in the second class, and it is urged with great force as to the subdivision of the third class. The United States legacy laws, which we have quoted above, and the tax inheritance laws of all, or nearly all, the States, separate classes, according to the nearness of the relationship of the beneficiary to the decedent. In a great majority of the States, the father, mother, wife and children are classed together and in a large number of the States are entirely exempt from taxation. "To make a distinction between collateral kindred or strangers in blood and kindred in a direct line, in reference to the assessment of such a tax, either by exempting the kindred in direct line or by imposing on collaterals and strangers a higher rate of taxation, has the sanction of nearly all the States which have levied taxes of this kind. It has a sanction in reason, for the moral claim of collaterals and strangers is less than that of kindred in the direct line, and the privilege is therefore greater." *Minot v. Winthrop*, 162 Mass. 123; Dos Passos on Inheritance Tax Law, page 48.

As in all the States where the tax has been upheld, there has been somewhat similar classification as to lineal descendants, collateral kindred, and strangers to the blood, it is fair to assume that all of the courts have considered this a reasonable classification. If it is considered that our law only divides into the three classes enumerated, such classification is reasonable and not in contravention of the constitution. It may be doubted if the \$20,000 exemption so-called in the first

class, if it should be held an exemption according to the ordinary use of that term, be not in conflict with the constitution because the amount exempt is unreasonably large. *Loan & Homestead v. Keith*, 153 Ill. 509.

On the reasoning in some of the cases it may be urged that as the tax inheritance law brings new property in for taxation, this \$20,000 which is not to be taxed, is really not an exemption. This is a general law and operates uniformly as to all in this class. The beneficiary who receives \$25,000 is not taxed on \$20,000 of the \$25,000; and the beneficiary who receives only \$20,000 or less is not taxed at all, all in this class being treated alike. Under the decisions of this State the legislature could lawfully pass an act charging liquor dealers a license only when they sell in quantities greater than one gallon, and allowing all who sell in less quantities than that to sell without a license. If such a law would not be in contravention of the constitution, and it certainly would not under the decisions, then can not this so-called \$20,000 exemption in the first class be justified on the same ground? The courts have repeatedly held that all of the lineal descendants could be entirely exempt. If this be so, is it not possible to justify the so-called exemption of \$20,000 in the first class, on the principle that the greater includes the less, and if the greater can be exempt, the less can? All are treated alike. The man who receives more than \$20,000 is only taxed on the excess. He receives his \$20,000 without paying any tax on it, the same as every other person in this class.

In the case of *Minot v. Winthrop*, *supra*, the Supreme Court of Massachusetts has said that a \$10,000 exemption which applied to an entire estate of a decedent was not so clearly unreasonable as to render the statute unconstitutional. In the case of *Ferris*, *supra*, the circuit judge in Ohio, in deciding the case in discussing a statute similar to ours, said that if the statute exempted \$20,000 or any other sum of every estate from taxation, it would not, in his judgment, be unequal and invalid.

If the so-called \$20,000 exemption in first class is not unconstitutional, for a much greater reason the so-called \$2,000 exemption in the second class must be held valid.

It is with the third classification that the greatest difficulty is met. This portion of the law reads: "In all other cases the rate shall be as follows: On each and every \$100 of the

clear market value of all property and at the same rate for any less amount, on all estates of \$10,000 and less, \$3 ; on all estates of over \$10,000 and not exceeding \$20,000, \$4 ; on all estates of over \$20,000 and not exceeding \$50,000, \$5, and on all estates over \$50,000, \$6 ; provided that an estate in the above case which may be valued at a less sum than \$500, shall not be subject to any duty or tax." If this be considered as one class, are all persons within this class taxed alike? Certainly not. Those who receive less than \$10,000 pay three per cent ; those who receive between \$10,000 and \$20,000 pay four per cent ; those who receive between \$20,000 and \$50,000 pay five per cent, and above \$50,000, six per cent. Considered as one class this must certainly be held invalid under the constitution. Does the legislature have the power in its wisdom to make classes of beneficiaries according to the amount that they receive? Is such a division purely arbitrary, or can it be justified in reason and public policy? No court, so far as I have been able to learn, in this country, has sustained as radical a classification as this division now under discussion. Minnesota on the Probate Tax Law heretofore referred to, decided it unconstitutional. In the case of *State v. Ferris*, 53 Ohio, 336, the Ohio Supreme Court in June, 1895, decided a law which had a somewhat similar classification, divided on the basis of the amount of money received by the beneficiary, unconstitutional, saying that "the right to receive the first \$20,000 in an estate not exceeding that sum is protected from taxation, while the right to receive the first \$20,000 of an estate exceeding that sum is taxed \$200. This is not equal protection. Again, the right to receive \$50,000 worth of property of an estate not exceeding that sum is taxed \$500, while the right to receive \$50,000 of an estate exceeding that sum is \$750. This is not equal protection. The same may be said of other gradations provided for in the statute." This classification in the Ohio statute was made with reference to the amount received by the lineal descendants and not with reference to the collaterals or strangers, as in our statutes, and it will be noticed that in that statute, where the classification is made on the amount of money received, the \$20,000 was exempt only with those persons who receive less than that amount. Those who receive more than \$20,000 did not have any of it exempt. In this respect the reasoning of the Ohio statute does not apply to the

statute under discussion. The United States legacy laws have never had a division based upon the amount received except the act of 1862, which provided a small tax on the probates of wills and letters of administration. This law was never directly attacked in the courts as to this provision. New South Wales and Queensland have inheritance laws with a progressive tax very similar to the law under discussion. Max West, "The Inheritance Tax;" *Studies in History, Economics and Public Law*, Vol. 4, No. 2, pages 45, 46.

Mr. Justice Brewer says: "I was not aware until such examination of the extent to which in this country the matter of taxation on successions has advanced. I have often urged that as one of the most just of taxes, and, if it were graduated in proportion to the amount of property passing, I think it would be most beneficial." Dos Passos on *Tax Inheritance Law*, page 2, note 2.

The principle of graduation, as it is called—that is, the levying of a larger percentage on a larger sum, though its application to general taxes would be in my opinion objectionable—seems to me both just and expedient as applied to legacy and inheritance duties. Mill's *Political Economy*, Book 5, Chap. 11, Sec. 3; see also Max West, "The Inheritance Tax," *supra*, page 124.

It is plain that many writers on economic subjects think there are strong reasons for an income tax graded in proportion to the amount received, and that judges of high repute concur in this view. If the classification be based upon reason, I believe that under our constitution an inheritance tax could be levied, graded in proportion to the amount received by the beneficiaries. If this portion of the law that I am now discussing had been worded so that all beneficiaries should be taxed three per cent on the first \$10,000 that they received, four per cent on the next \$10,000, five per cent on the next \$30,000 and six per cent on all in excess of that amount, I should feel strongly inclined to hold that the law was constitutional, even in the face of the Minnesota and Ohio decisions just referred to, and certainly a law drawn on reasonable lines graduating the taxes in proportion to the amount of property received by the beneficiaries, must be held constitutional, if the \$20,000 exemption in the first class in this act be constitutional. Under the law as it was passed a person who

is entitled to a legacy of \$10,001 is taxed \$400.04 and will actually receive only \$9,600.96, while a person who has a legacy of only \$10,000 is taxed \$300, and actually receives \$9,700, or about \$100 more than the person who, under the will was entitled to the larger legacy. Again, the person who receives more than \$50,000 is taxed \$600 on the first \$50,000, while the person who received only \$50,000 is taxed \$500 on it. Is this reasonable? Is this, as the Ohio Supreme Court says, "equal protection"? Why should a man who has a right to receive \$50,000 worth of property be only taxed \$500, while a man who receives an estate exceeding \$50,000 be taxed on an equal amount \$600? If the persons who are to receive, under this part of the law, \$10,000 or less, are considered as one class, and those who receive from \$10,000 to \$20,000 another class, and those who receive from \$20,000 to \$50,000 another class, and those who receive in excess of \$50,000 another class, then it is true that each one of these four classes respectively is taxed uniformly as to the class upon which it operates, but is there any good reason for considering this a reasonable classification?

It may be urged with a great deal of force that this law is in contravention of section 2, article II of the constitution, which says that the fundamental rights of property and liberty cannot be taken without due process of law or the "law of the land." "The law of the land is the opposite of arbitrary, unequal and partial legislation. The legislature has no right to deprive one class of persons of privileges allowed to other persons under the same conditions" *Ritchie v. People*, 155 Ill. 105.

Again the Supreme Court has said in *Hardy v. People*, 160 Ill. 465, that "each person subject to the laws has a right that he shall be governed by general public rules. Laws and regulations entirely arbitrary in their character, singling out particular persons not distinguished from others in the community by any reason applicable to such persons, are not of that class. Distinctions in rights and privileges must be based upon some distinction or reason not applicable to others, and it is only when such distinctions exist that differentiate, in important particulars, persons or classes of persons from the body of the people, that laws having operation only on such particular persons or classes of persons have been held to be valid enactments." See also *Wunderle v. Wunderle*, 144 Ill. 40, 53.

Is there any distinction in rights and privileges that differentiate, in any important particulars, the persons who receive by will \$20,000 and no more, from the class of persons who under this law receive by will \$20,100? Is not a rule purely arbitrary that compels a person who receives more than \$20,000 by will to pay four per cent on the first \$20,000 that he receives, and a person who receives by will not to exceed \$20,000 paying but three per cent? This classification into the \$10,000 amounts, \$20,000 amounts, and \$50,000 amounts creates classes of persons who possess rights and privileges not allowed to other persons under the same conditions.

While it is the established doctrine of our courts that the taxing power of a State is absolute and uncontrolled, except so far as it is limited by constitutional provisions, yet this must be followed with some reservation, for in our government there is no such thing as unlimited power of taxation. Limitations of taxing power arise out of the essential nature of all free governments. Chief Justice Marshall has said that "the power to tax involves the power to destroy." The implied reservations of individual rights without which freedom could not exist are respected by all governments worthy of the name. "Every thing that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be gravely scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property not warranted by any principle of constitutional government.

"In the second place, it is of the very essence of taxation that it be levied with equality and uniformity, and to the end that there should be some system of apportionment. Where the burden is common, there should be common contribution to discharge it. Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and as all are like protected, so all alike should bear the burden, in proportion to the interests secured. * *

* But whatever may be the basis of the taxation, the requirement that it shall be uniform is universal." Cooley's Constitutional Limitations, 6th Ed., 598, 607, 608, 615.

I am aware that it has often been said that perfect equality of taxation is unattainable. A mere approximate equality and uniformity is all that can be expected. Mere diversity in the methods of assessment and collection, if these methods

are provided by general laws, uniform as to the class upon which they operate, violates no general rule of right. As Mr. Justice Miller said in the *State Railroad Tax Cases*, 92 U. S. Rep. 612, on an appeal from an Illinois decision: "Perfect equality and perfect uniformity of taxation, as regards the individuals or corporations or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that a system which most nearly attains this is the best, but the most complete system that can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens in all the localities of a large State like Illinois, the application being made by men whose judgment and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfections of human nature." *City of New Orleans v. Davidson et al.*, 30 La. Annual Rep. 554.

I fully agree with this reasoning. But any legislation with reference to taxation which does not tend toward equality or uniformity by approximation, at least, ought not to be sustained. Any enactment respecting taxation is not in conformity with this principle of it "directly and necessarily tends to disproportion the assessment." *Cheshire v. Commissioners*, 118 Mass. 386; *Ins. Co. v. Commissioners*, 133 Mass. 162.

If this arbitrary division, as laid down in this law is to be sustained, what is to hinder the enactment of a law dividing into classes, which has even less justification and reason than this? In my judgment this law tends directly and necessarily to disproportion in taxation.

I have heard the argument made that this statute may be void in part without rendering the whole statute void necessarily. I believe that the part of the statute which we have here under discussion is so closely connected, and a part of the entire law, that if it is void, the entire law must necessarily fail. "We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not." *U. S. v. Rees*, 92 U. S. 221.

It is a fundamental doctrine that the same statute may be in part constitutional and in part unconstitutional, and that

if the parts are wholly independent of each other that which is constitutional may stand, but that which is unconstitutional will be rejected.

"But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless sufficient remains to effect the object without the aid of the invalid portion; and if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, or must fall with them." *People v. Cooper*, 83 Ill. 595.

I am thoroughly satisfied that this section of the law which divides into classes in accordance with the amount of money received is so connected with the entire law as to make it impossible, if that section is stricken out, to give effect to what appears to have been the intent of the legislature.

Viewing the provisions of this law as to classification, as I have indicated, I have not thought it advisable to discuss any other portions of the act, though I may say in passing, that Dos Passos' criticism on the statute in his work on Inheritance Tax Law, page 24, that "it does not seem to have been carefully drafted with regard to legal phraseology, and for this and other reasons, may, unfortunately, be the source of much litigation," appears to me just.

Believing, as I do very strongly, in the fundamental idea of a tax inheritance law, and that when such a law is properly drawn it is one of the most satisfactory methods of taxation, it is with great reluctance that I have been forced to the conclusion that the classification attempted in this law causes unjust discrimination between persons, is arbitrary, unreasonable and not based upon sound principles of public policy, and that the law must be held unconstitutional.—*From the Chicago Legal News of November 28, 1896.*

No. 425, 463 & 464.

ILLINOIS INHERITANCE TAX CASES.
(Progressive taxation and arbitrary exemptions.)

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOSEPHINE C. DRAKE ET AL., Executors, &c., <i>Plaintiffs in Error,</i>	}	No. 425.
vs. DANIEL H. KOCHERSPERGER, County Treasurer, &c., of Cook County, Illinois.		

ELIZABETH EMERSON SAWYER ET AL., Executors, &c., <i>Plaintiffs in Error,</i>	}	No. 463.
vs. THE SAME.		

JESSIE NORTON TORRENCE MAGOUN, <i>Appellant,</i>	}	No. 464.
vs. ILLINOIS TRUST AND SAVINGS BANK, as Executor, &c., of Joseph T. Torrence, deceased, and DANIEL H. KOCHERSPERGER, County Treasurer, &c.		

ORAL ARGUMENTS BY MR. GUTHRIE AND MR. HARRISON ON BEHALF OF
PLAINTIFFS IN ERROR AND APPELLANT IN SUPPORT OF THE CONTENTION
THAT THE ILLINOIS INHERITANCE TAX LAW IS UNCONSTITUTIONAL
BECAUSE IN CONFLICT WITH THE PROVISIONS OF THE FOURTEENTH
AMENDMENT.

WASHINGTON, D. C., JANUARY 28, 1898.

BENJAMIN HARRISON,
WILLIAM D. GUTHRIE,
EUGENE E. PRUSSING,
Of Counsel for Plaintiffs in Error and Appellant.

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ORAL ARGUMENTS BY MR. GUTHRIE AND MR. HARRISON ON BEHALF OF PLAINTIFFS IN ERROR AND APPELLANT IN SUPPORT OF THE CONTENTION THAT THE ILLINOIS INHERITANCE TAX LAW IS UNCONSTITUTIONAL BECAUSE IN CONFLICT WITH THE PROVISIONS OF THE FOURTEENTH AMENDMENT.

OPENING ARGUMENT BY MR. GUTHRIE.

MAY IT PLEASE THE COURT :

The questions in these cases arise under the fourteenth amendment, and involve the validity of an act of the legislature of Illinois, passed in 1895, commonly known as the Inheritance Tax Law of that state. The act divides into classes all persons succeeding to a decedent's property. It imposes upon those in one of these classes a progressive or gradu-

ated tax increasing from three to six per cent. according to value; and it grants to each person in another class an exemption of property worth twenty thousand dollars and also an exemption of estates for life or for a term of years, irrespective of value.

The constitutionality of the act is challenged upon the ground that it conflicts with the fourteenth amendment in that it imposes a tax which is arbitrary and unequal and according to no lawful system of classification, and therefore takes property without due process of law and denies to persons the equal protection of the laws.

The two principal points to be discussed are as to the power to grant arbitrary exemptions and as to the validity of a progressive inheritance tax graduated solely according to value or wealth. The general question in regard to the constitutionality of progressive taxation is becoming of great public interest; it concerns the people of every state; and it is now before this Court for its consideration and adjudication.

We shall contend on behalf of the plaintiffs in error in the first two cases and of the appellant in the third case that a law would be clearly unconstitutional which imposed a progressive tax upon property or individuals graduated solely according to value or wealth, or which granted large exemptions arbitrarily and for no sound reason of public policy; and that the same principles and rules should invalidate a law arbitrarily imposing a progressive tax upon estates of decedents or successions thereto and granting excessive exemptions. We shall contend also that our adversaries cannot maintain the extreme position they deem necessary to take in support of the act, that the power and control of the state

over the property of decedents is so absolute that it can wholly deny the right of inheritance or of testamentary disposition, and escheat or confiscate or arbitrarily dispose of such property at the will of the legislature; and we shall insist that even if the state has such absolute and despotic power in respect of decedents' property, then it must exercise the power impartially and by general and equal laws, and cannot discriminate against particular members of any class selected for taxation or regulation, and withhold from them rights which it grants to others freely and without tax.

The statute in question took effect in July, 1895, and since then has been the subject of litigation in the state courts. The Supreme Court of Illinois has held the law constitutional, reversing the judgment of the County Court of Cook County, which court had decided that the act was void because it violated the provision of the state constitution requiring taxation to be in proportion to the value of the property taxed or by general law "uniform as to the class upon which it operates." Somewhat similar legislation has been declared unconstitutional in other states—in Ohio, Wisconsin, Minnesota and New Hampshire—as obnoxious to the rule of equality.

The first case is Drake as executor against Kochersperger as treasurer of Cook County, Illinois, error to the Supreme Court of that state; and it presents, upon the point of jurisdiction, the doubtful question whether the judgment below sustaining the act is final within the meaning of the decisions of this Court, although nothing remains to be done thereunder except to calculate the amount of the tax and enforce it. The defence under the Constitution of the United States was specially pleaded in the court of original

jurisdiction. The second case is Sawyer as executor against the same, error to the Circuit Court of the United States for the Northern District of Illinois, and is an action which was originally brought in the state court and removed to the federal court. No diversity of citizenship exists. The ground of removal was that it appeared from the complaint, or petition as it is styled in Illinois, that the controversy arose under the Federal Constitution, in that the act was claimed to be in conflict with the fourteenth amendment and that no other than the federal question was involved; in other words, that the act would be defeated by one construction under the amendment or sustained by the opposite construction. No motion to remand was made below, and no point as to jurisdiction has been raised here by the state. The judgment of the United States Circuit Court overruled the defense that the act was unconstitutional under the fourteenth amendment. In the third suit, a bill in equity filed by Mrs. Magoun against the Illinois Trust and Savings Bank as executor of General Torrence and also against the County Treasurer, the jurisdiction is clear by reason of diverse citizenship. The complainant, who is the daughter of the testator and the principal legatee under his will, and who is liable as such for a tax of six thousand dollars, upon whose property the tax is a lien, and whose title it clouds, being a resident and citizen of New York, filed this bill in the United States Circuit Court at Chicago against citizens of Illinois to enjoin the trust company from paying the tax. The suit is one of equitable cognizance within repeated rulings of this Court and as held in one of the cases decided at this

term (*Ogden City v. Armstrong*, 168 U. S., 224). The court below sustained the demurrer to the bill, and the only question presented was as to the constitutionality of the law under the fourteenth amendment.

At this point, and before reciting the provisions of the act, it may be proper to state that we do not deny the power of the legislature to tax successions and inheritances and transfers by testamentary disposition. We admit that under the fourteenth amendment certain property or certain classes can be singled out for taxation even though this may result in exempting other property and other classes from any tax burden; that in the case of succession or inheritance taxes near relatives may be placed in one class and collateral or distant relatives and strangers in other classes, and that one class may be taxed and another class not taxed. But we do deny the power to grant excessive exemptions in any class and to impose progressive taxes varying in rate arbitrarily according to the amount of property or the wealth of the taxpayer or the value of a decedent's estate or the amount inherited. Our plea is that the power of taxation, so great and so liable to abuse, shall be exercised impartially and by equal laws, and that taxes shall be imposed proportionately upon all persons properly within the same class and owning like property or exercising like rights under substantially similar conditions. As Mr. Justice Matthews said: "the equal protection of the laws is a pledge of the protection of equal laws"—whether tax laws or any other laws.

This legislation is purely and simply a tax or revenue law, purporting, as its title and every provision declare, to

levy a tax on successions or inheritances. The law provides that the tax shall be upon property and be paid by the successor or legatee; it is to be deducted from the legacy or inheritance. That it is a tax as such upon the succession to property has been expressly held by the state court, and this is practically admitted in the defendants' brief.

These inheritance taxes are not based upon the power of the states to regulate descents and wills. They originated in probate duties, and were always regarded as tax or revenue measures. The federal inheritance or succession taxes during the Civil War were clearly not sustained upon the ground of any power to regulate successions to decedents' property, for Congress has no such power. The tax or excise or duty, whatever we choose to call it, was upheld as a legitimate exercise of the federal taxing power, and not upon any theory that Congress could deny the right of inheritance or of testamentary disposition and escheat or confiscate all the property of a decedent. We are, therefore, in the present case, considering nothing but a tax law and in no proper sense a statute regulating inheritance. If, however, it were not a tax, but an attempt on the part of the Illinois legislature to regulate the right to inherit or to succeed through testamentary disposition, granting it freely to those of moderate means and denying it on equal terms to those of larger means, we should then insist that the act would be clearly void, because unequal and based upon an arbitrary classification; and it would also be as clearly void if it were an attempt to force a redistribution or equalization of property under the pretense of taxation.

The Illinois Inheritance Tax Law, which is now before your Honors for consideration, divides persons inheriting or succeeding into three principal classes: in the first class are near relatives, parents, husband or wife, children, brothers and sisters, and adopted children; in the second class are collateral relatives, uncles, aunts, nephews and nieces, or any lineal descendant of the same; and in the third class are all other kin and legatees. This third class is said to be again classified or subdivided into four classes, and this subdivision is made according to the value of the decedent's estate, as we contend, or according to the amount or value inherited by each person, as our adversaries contend. The Illinois Supreme Court in the opinion in the *Drake* case says that "by this act of the legislature six classes of property are created, heretofore absolutely unknown, * * depending upon the estate owned by one dying possessed thereof." It was necessary for the court to hold that each variation in the progressive rate created or constituted a separate and distinct class of property for taxation in order to maintain even a colorable compliance with the provision of the Illinois constitution requiring taxation to be according to the value of property taxed or by general law "uniform as to the class upon which it operates."

The act provides in the first class for a tax of one per cent. on the amount inherited by each near relative. This class is granted an exemption of estates for life or for a term of years in real or personal property, and also an exemption to each successor or legatee of property worth twenty thousand dollars, wholly irrespective of the value of the estate of the decedent, the poverty or wealth of the

recipient, or the number of successors or legatees. The estate of a decedent may consist of property worth several hundred thousand dollars, but there is no tax if it be divided or parceled into estates for life or for a term of years and legacies of the value of twenty thousand dollars each. As Professor Gray points out in his work on Perpetuities, "a remainder after a term for years may not come into possession for centuries." The tax is imposed upon the remainder, to quote the exact language of the act, "after deducting therefrom the value of said life estate or term of years." If the estate for life or for years be bequeathed or devised to a near relative with remainder to a lineal, the estate is taxed; but if the remainder be to a collateral the estate for life or years is not taxed. If a man be devised or bequeathed a term of years, however long, he pays no tax; if he inherit a similar term of years, he must pay the tax. No wonder Dos Passos deploras the slovenly and arbitrary features of this act. How can we explain the discrimination resulting from taxing an estate for life or years if remainder be to a lineal, and exempting if the remainder be to a collateral or stranger, except upon the idea that the legislature was really seeking to force redistribution of property and to ordain that large estates should not remain in the same family beyond a life estate or term of years? If General Torrence, instead of devising the fee to his daughter, had left her a term of ninety-nine years or longer—a provision not at all unusual in Chicago, particularly in connection with the large hotels and office buildings there—the whole estate would have been

freed from the tax, for the remainder would have been of little value. The exemptions in this class may, therefore, attain enormous proportions. In the second class, comprising collateral relatives, the exemption is two thousand dollars to each successor. The amount is, of course, very much smaller than the exemption in the first class, and there is no exemption of estates for life or for a term of years; but the second class is numerous, and this exemption also might well represent large amounts. In the third class, small estates or legacies of less than five hundred dollars are exempted. I shall refer later to the grounds upon which reasonable and small exemptions have been sustained by the courts.

As to the third class of distant relatives and strangers, a question of great importance arises—whether progressive taxation can be permitted under the American system of equal laws. The tax in the third class is progressive or graduated. This class is said, as I have stated, to be again subdivided into four classes of property, depending solely upon value, or, to repeat the language of the Supreme Court of Illinois, “classes heretofore absolutely unknown, * * * depending upon the estate owned by one dying possessed thereof.” The rate in the third class is three per cent. on all successions in estates of ten thousand dollars and less, four per cent. in estates over ten thousand and not exceeding twenty thousand dollars, five per cent. in estates between twenty thousand and fifty thousand dollars, and six per cent. in estates over fifty thousand dollars.

In order to illustrate the operation and effect of the progressive tax in this Illinois act and to show its arbitrary

features, a few practical examples may be stated under both aspects—whether the rate depends upon the value of the estate or upon the amount inherited. Taking the view that the rate of the tax in the third class depends upon the value of the decedent's estate, let us assume that A is entitled to a succession of \$5,000 out of an estate of \$10,000, and that B is also entitled to a similar succession of \$5,000, but out of an estate of \$51,000. A pays three per cent. or \$150; but B must pay six per cent. or \$300 for the right to receive exactly the same sum; in other words, B pays double the tax for exercising the identical privilege or right of succession to the same amount simply because the estate out of which his legacy is payable happens to be more valuable. Or let us suppose two estates: one of \$10,000 passing to one legatee and another of \$60,000 passing to six legatees who receive \$10,000 each. In both instances, each taxpayer or legatee is entitled to receive \$10,000; that is the extent or value to him of the so-called privilege or right of succession. In the one case, the legatee pays a tax of three per cent. or \$300; in the other, he pays a tax of six per cent. or \$600, double, on receiving exactly the same legacy. This is the method throughout the whole class.

The progression is likewise unjustly and oppressively arbitrary if we take the view, as contended by the defendant, that the rate of the tax in the third class is based upon the amount or value received by the successor, which, it seems to us, is not the true interpretation of the statute. If the rate in this class does depend upon the amount or value inherited by each

person taxed, then we submit that the act comes within the language of Mr. Justice BREWER in the *Gulf, Colorado and Santa Fé* case, decided at the last term, where he said: "Yet it is equally true that such classification cannot be made arbitrarily. The state * * may not say that all men of a certain age shall be alone thus subjected, *or all men possessed of a certain wealth.* These are distinctions which do not furnish any proper basis for the attempted classification." Under the assumption that the rate of the tax in the case at bar depends upon the amount inherited, the tax is, nevertheless, arbitrarily imposed so as to result in unnecessary inequality. Thus, one who is entitled to receive a legacy of \$10,000 pays three per cent. or \$300; while one entitled to a legacy of \$10,001 pays four per cent. on the whole amount, or \$400.04—that is to say, \$100 more tax for succeeding to the extra dollar. This runs through the whole class. The accidental addition of one dollar, or of a few cents, to a legacy or inheritance, may make a difference of several hundred dollars in the tax. For example, A may inherit \$50,000, on which the tax is five per cent. or \$2,500; while B inherits \$50,001, on which the tax is six per cent. or \$3,000.06. B is therefore taxed \$500.06 in excess of A because he inherits one dollar more.

Many of the arbitrary features of this act could easily have been avoided by omitting the exemptions in the first class and by imposing the tax in the third class equally according to the amount actually received; for example, three per cent. on the first ten thousand dollars, four per cent. on the second ten thousand, and so on, as was the rule

adopted in the federal income tax. If progressive taxes are to be allowed, let us at least have reasonable provisions, drawn on lines approximating to some fair rule of equality. The Supreme Court of Colorado, in speaking of this particular act, said that "the statute of the State of Illinois * * is one of the most objectionable acts upon the subject to be found."

The principal provisions of the act are now before the Court. They are contained in the first two sections. The remaining sections relate to the machinery of collection.

Mr. Justice BROWN. Let me interrupt you right here, Mr. Guthrie. In the cases you have cited from other states, holding similar laws to be unconstitutional, did the courts have reference to the federal constitution or to the provisions of state constitutions?

Mr. GUTHRIE. In no case except in Ohio was reference made to the federal constitution. In Ohio the Supreme Court of that state said that the provision of the state constitution was the equivalent of the guarantees contained in the fourteenth amendment. They said that the provision of the Ohio constitution requiring uniformity was as broad as the provision of the fourteenth amendment. In the other cases, they proceeded upon provisions requiring equality or uniformity in taxation.

The rule of our past has been equal and proportional taxation—namely, taxing all property or fortunes on the same rate of computation. That is the constitutional rule in Illinois, and this act could only be sustained by holding that for purposes of taxation separate classes of the same property could be created depending solely upon value and taxed at different rates.

The least reflection must convince us that, where the principle of proportional or equal taxation is abandoned, no definite rule remains. As Mr. Lecky has said in his "Democracy and Liberty": "At what point the higher scale is to begin, or to what degree it is to be raised, depends wholly on the policy of governments and the balance of parties. The ascending scale may at first be very moderate, but it may at any time, when fresh taxes are required, be made more severe, till it reaches or approaches the point of confiscation. No fixed line or amount of graduation can be maintained upon principle, or with any chance of finality. * * Graduated taxation is certain to be contagious, and it is certain not to rest within the limits that its originators desired." Even those who favor progressive taxes on inheritances frankly warn us to be cautious in advocating or attempting any general application of the principle, and confess that the objections to progression in this country may be insuperable if we give heed to the dangers it threatens.

In our briefs we have quoted from historians and writers, not with any idea that the Court is to embark on the shoreless sea of economic theories and speculations, but simply to show the true nature and tendency of progressive taxation, and that it cannot be other than arbitrary; that is to say, that there is no rule or principle yet discovered by which to control or prevent the severest rate or, indeed, spoliation. These extracts will, we believe, persuade the Court that great dangers lurk in progressive taxation and that it contains the germs of confiscation. The maximum to-day in Illinois is only six per cent., and, if it could be adjudged that this is

the limit, our clients would cheerfully pay the tax; but the maximum may be increased to fifteen or fifty per cent. to-morrow. The New York legislature voted last year for a maximum of fifteen per cent. on large estates; and the act had to be vetoed by the Governor. We are contesting here not the particular rate, but the beginning of a vicious system which may end in confiscation and ruin.

The *rate* of taxation upon selected subjects or classes is, of course, in the discretion of the legislature. If legislatures are compelled to impose equal taxes on all, we have a sufficient protection and safeguard against abuse by the majority in a country like ours where property is generally distributed. If the legislatures are free to impose progressive taxes, the security of property is gone. Concede the principle of progression, and there is no limit to the injustice a legislature may commit upon the minority. We must invoke the maxim—the only safe rule of conduct—*obsta principiis*.

The grounds upon which this act has been sustained and is sought to be defended may now be mentioned.

It is not claimed that in regard to property, in the hands of living owners, progressive taxation or excessive exemptions to individuals would be constitutional under the fourteenth amendment; but it is contended that a different rule may be applied in the imposition of taxes on inheritances or successions from that which must be observed in taxing property. The contention is that the right to inherit and the power to dispose by will are the creatures of statute law, depend solely upon it for exist-

ence, and are but the favor or license of the legislative branch of the state government to be withheld or granted in its discretion, and upon such terms and conditions, arbitrary or otherwise, as it sees fit. This is the extreme argument considered necessary by the state in order to sustain the exemptions and progressive features of this act of the Illinois legislature.

The ground taken by our adversaries, as stated in their brief, is that the legislature has the absolute power of control over the property of a decedent and may declare that it shall not pass, either by his will or to any person or class of persons by descent, but shall escheat to the state. Their position is that as, in their view, the legislature may reserve or take all, it may reserve or take part and impose any terms it sees fit, arbitrary or otherwise, upon granting or bestowing the remainder. They argue that, as this right of inheritance or testamentary disposition has in the past been regulated by statute, it may be denied or destroyed by statute, because statutory law created it. If the right of inheritance or testamentary disposition may be denied because heretofore regulated by statute, would not the same argument apply to innumerable rights of persons and even to the title to property itself? From the very beginning with us in this country, and particularly in the Northwest Territory, the title to lands has been regulated by statute and derived from it. Could the legislatures repeal such statutes and transform all property into mere estates for life, escheating to the state on the death of an owner?

We may pause a moment in the line of

argument to remark that even if the state be assumed to be the natural successor to a decedent's property—that its intestate laws and statutes of wills are acts of grace—that it can deny the right of inheritance or testamentary disposition and cause to escheat all property on the death of the owner, the Illinois act before the Court is nevertheless repugnant to the fourteenth amendment.

Mr. Justice GRAY: Going back a moment to your last point, Mr. Guthrie: How far would you be willing to admit that the legislature could change the course of inheritance?

Mr. GUTHRIE: Within reasonable lines. This power of regulation has always been exercised in this country and in England.

Mr. Justice GRAY: You would not, for instance, say that the law of descent would be void as applied to persons now living, who die hereafter?

Mr. GUTHRIE: Not at all. There is no vested right in that particular.

Mr. Justice GRAY: You would not suggest there was any imperfection in a law which provided that a living man shall not give away more than the half of his property to his wife, though he had before the right to will away the whole?

Mr. GUTHRIE: Not at all. These are all reasonable regulations to be prescribed according to the policy of the particular state. But we do contend that if the legislature should pass an act providing that a man should not leave his property to his wife or to his child, but that it should wholly escheat to the state for the benefit of the com-

munity at large, that would be so arbitrary an exercise of power that it would be unconstitutional and void. Regulation is one thing; confiscation, quite a different proposition.

Mr. Justice BROWN: In many continental countries, the power of testamentary disposition does not extend beyond half the estate, I believe?

Mr. GUTHRIE: In Holland, in France and in a number of the continental countries, the power of disposition is said to be limited by the superior right of children to inherit; but it varies in all countries. We find in some countries a policy that there shall be absolute inheritance—that parents shall not disinherit their children; while in other countries we find more and more absolute powers of ownership given to the possessor or to the living person as may be required by the public policy. But everywhere, in every country, in every state, we find either absolute testamentary power or the right of children to inherit.

Mr. Justice HARLAN: What do you say about the power of the legislature to prevent the disinheriting of a child?

Mr. GUTHRIE: It would have that power, without question, and it would be a valid limitation upon the testamentary power. It would be but a recognition of the natural right of children to inherit and the natural duty of parents.

If your Honors please, I was about to say, that even if this absolute and despotic power as to a decedents' property exist, even to the full extent claimed by the other side, we

contend that this right of succession as long as it exists, as long as it is granted to anybody, rich or poor, is a property right of pecuniary value and must be granted impartially and by general laws: it cannot be granted to those of moderate means and denied wholly or partially to those of larger means. The acts of grace of a state are not like the gifts of a private person, or of an irresponsible despotic sovereign who bestows according to his fancy. They are solemn laws which must affect impartially and equally all persons within their purview. The power of a state to prescribe rules for the devolution of property does not eliminate or diminish the necessity for equal laws. Those who legislate must be made to appreciate, as LOCKE said in his *Civil Government*, that laws are "not to be varied in particular cases, but ought to have one rule for the rich and poor, for the favorite at court and the countryman at the plough." Judge COOLEY says (*Const. Lim.*, p. 484): "To forbid an individual or a class the right to acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their 'pursuit of happiness.'" The Supreme Court of Illinois in its opinion in the *Drake* case refers very properly to the "right of succession." This *right*, whatever its origin and character, is a property right of immense value, and, while unrevoked, all rich or poor are entitled to enjoy it impartially under "the equal protection of the laws." Special privileges cannot be granted under any pretense or any form of class legislation in any state of the Union.

I may also here read to your Honors what the Supreme Judicial Court of Massachusetts has said upon the point of the power of the state to escheat all property. It was in the case of *Minot v. Winthrop* (162 Mass., 113). Chief Justice FIELD in the opinion of the court, as quoted on page 27 of our brief, and speaking of this alleged absolute power said: "We have no occasion in these cases to consider whether the legislature has the power to make the Commonwealth the universal legatee or successor of all the property of all its inhabitants when they die, for the purposes not only of paying the public charges, but also of distributing the property according to its will among the living inhabitants, or for the purpose of abolishing private property altogether. We assume that under the Constitution this cannot be done, either directly or indirectly; that the legislature cannot so far restrict the right to transmit property by will or by descent as to amount to an appropriation of property generally; that it cannot impose a tax which shall be equivalent, or almost equivalent, to the value of the property, and cannot so limit the persons who can take as heirs, devisees, distributees or legatees that the great mass of all the property of the inhabitants must become vested in the Commonwealth by escheat. The state can take property by taxation only for the public service, and we assume that its right to take property, if any exists, by regulating the distribution of it on the death of the owner, is limited in the same manner, and that this right must be exercised in a reasonable way."

Now, it may be conceded that the principles of classification which this Court has declared in expounding the fourteenth amendment do not inhibit a state from placing the property of decedents, or rights of succession thereto, in a distinct class for purposes of taxation. Having drawn a line between transfers of property *inter vivos* and successions after death, the state may subject the latter to further classification in respect of successors. Thus, aliens may be singled out for special burdens, or excluded altogether, distinctions may be drawn between relatives and strangers, and relatives may be classified according to their degrees of kinship to the decedent. All these classes are definable with regard to relative differences and existing distinctions; they are not arbitrary, and different rates may be imposed upon property passing to each without necessarily denying to successors the equal protection of the laws. If the classification rests upon an intelligible and reasonable foundation, it will be upheld when all in each class thus selected are equally taxed or equally exempted.

The state may reasonably regulate the right of devise and bequest just as it may regulate the transfer or the holding of real or personal property, but the power to regulate cannot involve the power to escheat or confiscate property. The state may designate heirs in case of intestacy, grant full testamentary power, exclude aliens, confer rights of curtesy and dower, forbid perpetuities, safeguard creditors, declare want of capacity in infants or insane persons, and otherwise regulate the holding or disposition of property according to its policy; but this general power of the state to regulate does not confer legisla-

tive power to convert such property to public use without compensation upon the death of the owner in disregard of the claims of child or widow. Frequent sanction by legislative enactment of the right of inheritance or testamentary disposition is entirely consistent with the claim that these rights are natural or fundamental rights which, under our system, the states are bound to recognize in one form or another. The state may regulate successions to property as it can declare that aliens shall not hold property within its borders, and the manner, the form, the method of transfers *inter vivos*. Yet, no one would take the position that this power of regulation—for example, as to the conveyance of land or the exclusion of aliens or corporations—would enable the state to pass a law prohibiting all sales and dispositions of real property, or unreasonably and arbitrarily limiting the use of property. If a state should attempt to impose arbitrary regulations previously unknown, the power would have to be denied. A deed may have to be under seal, with certain formalities, accompanied by the payment of a stamp tax or duty and other reasonable requirements; all this is regulation. But unreasonably and arbitrarily to limit the use of property or to restrain transfers even to resident citizens would be quite a different thing. It would be confiscation or spoliation and not regulation. It would be depriving a man of property without due process of law. It would not be legitimate legislation.

The consideration of this general question of legislative power over successions presents two different aspects,

which should be briefly noticed: the one, as to the right of inheritance; the other, as to the power of a testator to devise or bequeath his property. These points will be discussed more at length by Mr. Harrison.

The right of inheritance, although regulated by statute for hundreds of years, is not the creation of statute law. It existed among the Anglo-Saxons, and it prevailed in England long before the Conquest. It was recognized and perpetuated in the great charters of English liberty. By legal historians, it is treated as "our common law of inheritance." It was a customary right prior to any statute of which we have record. As Mr. Justice BROWN said in a recent case in this Court: "The general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents." In the latest authoritative history of English law, by Pollock and Maitland, the authors say that, "in calling to our aid a law of intestate succession, we are not invoking a modern force," and that "the time when no such law existed is in strictest sense a prehistoric time." This right of inheritance was recognized in the ordinance of 1787 for the government of the Northwest Territory, and ever since has been embodied in the laws of Illinois. It was a right established in every one of the thirteen original states at the time the government was founded. It had existed in the colonies and for centuries before in England, and has always been exercised and enjoyed by our race. It was deemed a right by the Romans in the Twelve Tables. It was a right with the Egyptians. We find it everywhere in the Mosaic law, and a distin-

guished writer holds it to be the general direction of Providence. As Chancellor KENT said, "nature and policy have equally concurred to introduce and maintain this primary rule of inheritance in the laws and usages of all civilized nations." The right of children to inherit in the case of intestacy is recognized in every state and always has been.

The power to devise or bequeath property at will developed as a limitation upon the right of inheritance, and in order to prevent escheat for want of heirs, and as the progress of society or the policy of a country demanded more and more absolute powers of ownership. However evidenced—whether in statute or in the old customs and the practice of *post obit* gifts—the power has been recognized as an incident of the right of property—as a natural right—from time immemorial, and has been considered a common-law right in America. It originated in custom long before the period of Norman rule. It was practised for centuries before the Battle of Hastings, both in Normandy and in England; it was deemed a disgrace to die intestate, for that implied death without absolution; the priest always witnessed the *post obit* gift. Blackstone said that "in England this power of bequeathing is coeval with the first rudiments of the law, for we have no traces or memorials of any time when it did not exist."

The position of our adversaries is that a state legislature has absolute power to deny the right of inheritance and of testamentary disposition, and escheat whatever private property a man may have accumulated as a result of a life's labor or a life's economy. That such a policy—

that the possibility of the exercise of such a power—would take away all incentive to labor, shake society to its very foundations, and destroy our civilization, cannot be doubted for a moment. Is there such legislative power in any of the United States? Can it be asserted that the legislatures of the states can deprive us of rights which have been recognized and enjoyed by our race for centuries before this continent was discovered? There is not a civilized—if, indeed, there be a barbarous—state in the world to-day, that does not recognize the rights of inheritance and of testamentary disposition. The dying Indian can dispose of what he has accumulated. The savage, all over the world, instinctively considers it a natural right at death to dispose of his property. It is a right exercised everywhere, subject only to the limitation which we all recognize and concede—that the government may step in on grounds of public policy and ordain that natural heirs shall not be disinherited, or that property shall not pass to aliens, or to foreign corporations, or to such corporations as it deems should not be allowed to hold or accumulate property. The state in making such regulations derives its power not from the idea that the property escheats and belongs of right to it on the death of the decedent, nor from any notion that the ownership is in the state, but from that *suprema lex* which justifies every society in reasonably protecting itself according to its public policy—a power it may exercise as to the property of the living as well as of the dead.

We confidently assert that, under our system of constitutional government, no legislature has the arbitrary and absolute power to deny all right of inheritance

or all power of testamentary disposition. Nor have any of the cases cited by the defendant held that there was any such despotic power, although expressions to that effect, *obiter* and speculative, are to be found. These expressions depend upon erroneous assumptions and were made without investigation. No state ever attempted to exercise such a power, nor did Parliament in its most despotic period; and no court in this country has ever decided that any such arbitrary power existed, for no such point was necessarily involved. The defendant urges that we are unable to show any authority adjudging that inheritance and testamentary disposition are natural and fundamental rights which the legislatures cannot deny, and that we can only cite historians of the law. The reason is obvious: no state ever attempted to deny the right. To quote the language of Mr. Justice Patterson one hundred years ago (in *Vanhorne's Lessee v. Dorrance*, 2 Dall., 304, 310): "Such an act would be a monster in legislation, and shock all mankind."

Two cases in this Court are cited by the defendant as establishing the doctrine that a state can wholly deny the right to inherit or to transfer by last will and testament; but they sustain no such proposition.

The first case, decided in 1850, is *Mager v. Grima*, (8 How., 490, 493-4), where the Court sustained a law of the State of Louisiana imposing a tax on alien heirs or legatees. Chief-Justice TANEY, delivering the opinion of the Court, said that "every state or nation may unquestionably refuse to allow an *alien* to take either real or personal property, situated within its limits, either as heir or legatee, and

may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state. In many of the States of this Union at this day, real property devised to an *alien* is liable to escheat. And, if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy." The second case is *United States v. Perkins* (163 U. S., 625, 628), in which the Court held that personal property bequeathed to the United States was subject to the New York inheritance tax, and that the state had a right to impose a tax upon the transfer or succession of any property.

It must be evident that there is nothing in these cases tending to sustain any such extreme position as that the state may wholly deny to our own citizens the right of inheritance or of testamentary disposition and escheat all property on the death of its owner. No such question was before the Court, and no such point was decided. Of course, the Court proceeded on no such ground when it sustained the federal inheritance tax in *Scholey v. Rew* (23 Wall., 331), for no one has ever claimed that Congress could regulate inheritances or deny the right of testamentary disposition.

Returning now to the consideration of the exemptions in the first class, we may repeat that this Illinois tax law grants to each near relative an exemption from the tax of estates for life or for a term of years, and of property worth twenty thousand dollars. Estates for life or for a term of

years in real or personal property may be of immense value and represent enormous incomes, but they are wholly exempted if passing to any members of this class. The exempted class includes all near relatives, parents, husband or wife, children, brothers and sisters and adopted children, and is consequently numerous. An exemption of property worth many hundred thousand dollars would not be unusual; and any testator may avert the tax by dividing his property into estates for life or for years and legacies of twenty thousand dollars.

The power of the state legislatures to grant reasonable exemptions to individuals need not be questioned, nor the power to grant exemption to corporations which more or less serve some public purpose. Reasonable exemptions have been upheld in some cases on the ground that the expense of collection would exceed the amount collected, and in other cases as relieving the very poor and needy from the burdens of government. Desty, in his work on Taxation, said that the only justification for such exemptions is the public policy which seeks "to enable the poor man not yet a pauper to escape becoming a public burden." As one of the leading cases states the rule: "Exemption from taxation should be based only on a well-grounded public policy, by which all share in the benefits."

Exemptions of lineals and other next of kin of the first blood will be found in the legislation of many states, and this distinction between lineals and collaterals or distant relatives and strangers has been sustained as a reasonable and justifiable classification. If the Illinois statute had taxed only collateral or distant

relatives and strangers and exempted the whole class of near relatives, the classification or exemption might have been proper. But our point is that, having selected near relatives as one class for taxation, the entire class must be taxed proportionately; that one cannot be taxed and another exempted in the same class; that children inheriting twenty thousand dollars and estates for life or for years cannot be exempted while those inheriting the fee or more than twenty thousand dollars are taxed. Exemption from taxation is but a form of class legislation, although it is called classification. Its legality is capable of being tested by the standard of reasonableness; in substance, it involves placing the exempted in a specially favored class. The legislature may define classes of property or individuals that actually exist, but it cannot create them; it cannot classify individuals as such; it cannot classify the same property or subjects simply according to value for taxation at different rates. Although the power to exempt has been said to be of legislative discretion, yet its exercise cannot, of course, be arbitrary. It must be reasonable and impartial, and grant to all similarly situated the same rights. Within the decisions of this Court in analogous cases, an exemption "cannot be sustained when special, partial and arbitrary."

A tax law which contains arbitrary exemptions could not be termed equal in any sense. All exemptions necessarily tend to increase the taxes to be levied on the non-exempted. If in Illinois all property owners could be allowed an exemption in ordinary taxes of property worth twenty thousand dollars or estates for life or for years, it would free from taxation the greater part of

the taxable property of the state, and of necessity impose a much heavier burden on the non-exempted. If inheritances of twenty thousand dollars can be exempted, so may inheritances of fifty or one hundred thousand dollars; and a very high and unjust rate must then be imposed on those not equally favored with exemption.

The advocates of this exemption seem to argue that, as we concede that the whole class of direct heirs might have been practically exempted by not being taxed at all, the greater includes the less, and that therefore any exemption to them, however unreasonable and unnecessary, is within the discretion of the legislature. Such an argument would justify the grossest and most arbitrary exemptions, under any form of taxation, upon property or otherwise. The same reasoning, if sound, would uphold an exemption of twenty or fifty thousand dollars or more to all owners of any class of property. The proposition refutes itself.

It is important that the Court should appreciate that these exemptions exceed in amount anything heretofore known in this country under any form of taxation, so far as we have been able to ascertain. The highest exemption contained in the inheritance tax of any state is ten thousand dollars in Massachusetts and in New York, based in each case upon the value of the decedent's estate and not upon the amount passing to each legatee. Elsewhere the exemption is smaller and is based upon the value of the decedent's estate. In all states except Illinois and California, the exemption is fixed, definite and certain, depending upon the value of the estate; and, when these small estates are distributed, the recipients may be

entitled to a mere trifle. In California, it is of legacies or inheritances of \$500. But, in Illinois, the \$20,000 exemption is a minimum; the maximum may be several hundred thousand dollars, depending upon the number of legatees and the creation of estates for life or for years.

If your Honors please, what just or legitimate reason can there be for exempting, if life estates and estates for a term of years be given, and yet taxing, if the fee or the principal be inherited? Estates for long terms of years are being constantly created in Chicago; they are of immense value, and ordinarily the remainder or reversion is of little value. Mrs. Magoun, the appellant, is devised the fee or principal, and must pay a tax of six thousand dollars; she would pay no tax if she had been devised a term for ninety-nine years, although just as valuable as the fee. Is it not arbitrary and capricious to thus distribute the burden of taxation? What excuse or reasonable ground is there for any such exemption? What public policy prompts it? What was the moving cause? We can conceive of nothing except the intention to favor some particular individuals who desired to escape the tax by the creation of estates for life or for years.

It may be suggested that there is no inequality or discrimination in the Illinois act because the same exemption is granted to each person, rich or poor, and all alike can circumvent the act and throw off the tax by the creation of estates for life or for a term of years. This argument would sustain an act, for example, which exempted from a property tax farms or other property of the value of twenty or fifty or one hundred thousand dollars and imposed all the burdens of government and taxation upon those

who owned more valuable property, because the exemption was allowed to all and consequently was equal. The result would be that the whole burden of the taxes at confiscatory rates would have to be imposed upon the few rich. Perhaps, it sounds plausible to argue that there is no discrimination, no inequality, if the same exemption or the same privilege of circumvention be allowed to all alike; but this Court can find no difficulty in exploding so fallacious a proposition. Such a tax law is but a pretense of equality; it lacks the essence of legitimate legislation. If exemptions can be sustained on any such ground, when the true intention and motive and purpose of the legislature are obviously to exempt the majority of property owners, and to enable the law-makers to single out the few rich for the benefit of the many; if exemptions can thus be granted and all property owners of moderate means relieved of taxation and the whole burden of government thrown on the rich,—then there is no real security for property and the pledge of the protection of equal laws is empty and delusive. We should be as much at the mercy of legislatures and would suffer as bitterly therefrom as France suffered from her National Assembly when, during the Revolution, it practically taxed at one hundred per cent. what they were pleased to call the “superfluous.”

But we are told that we concede the power of the state legislatures to grant reasonable exemptions, and we are asked: “Where do you draw the line?” We draw it on the hither side of the unnecessary and unreasonable and arbitrary. Show this Court an exemption to individuals which is not based on some sound and reasonable ground of

public policy, and we affirm that it will be annulled. The Court held that legislatures might regulate the charges of railroads and warehousemen and others, and the claim was at once set up that, having legislative power and discretion to regulate, the legislatures had absolute power and were untrammelled by interference of the federal courts under the federal charter of liberties. "Where do you draw the line?" was asked then, and this Court answered that the power to regulate could not be unreasonably and arbitrarily exercised and did not involve the power to confiscate. As Mr. Justice McKENNA said in the suit against the *California Board of Railroad Commissioners* (78 Fed. Rep., 236, 257): "The power of the state stops at injustice." It was claimed that the exercise of the police power was in the discretion of the legislatures. That was conceded, but the answer, in the ever-to-be-remembered language of Mr. Justice HARLAN, was that "there are, of necessity, limits beyond which legislation cannot rightfully go. * * The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

I may add a word here as to the power of taxation. A legislature, for example, may properly impose a tax upon the transfer of real estate, usually called a stamp duty, although essentially an excise tax, but it could not withhold from the owner of real property the right or power to convey it. A legislature may impose a tax upon all checks, as the

Federal Government did for many years, but it could never have been conceived that any legislature, or that Congress, had the power to deny to the people the right to pay their debts by means of checks. A legislature may impose a tax upon the sale of any kind of personal property or upon the sale of stocks or grain or anything else, but its right to tax in these cases is not based in any sense upon the theory that it has the power to confiscate or to deny the right of sale, which is a part of property itself. A state legislature or Congress may impose a stamp tax upon the publication of newspapers or magazines or books, but its authority to do so does not originate in any sense in a power to prevent publication. All this is regulation and legitimate taxation, but does not involve the power to arbitrarily destroy.

The defendant's brief refers to the fact that England and other nations have adopted the progressive principle as to inheritance taxes. Surely, it can hardly be necessary to recall that ours is the only government founded upon the principle of equality and a written constitution guaranteeing fundamental rights and distributive justice and securing to every "person within its jurisdiction the equal protection of the laws." We are not living under a system of English parliamentary rule, unchecked and unrestrained by constitutional limitations. One hundred and five years ago Mr. Justice WILSON, in *Chislm v. Georgia* (2 Dallas, 419, 462), compared our form of government with the British and showed that the latter was but a despotism of Parliament, and Mr. Justice MILLER in *United States v. Lee* (106 U. S., 195, 208), ninety years later, again set forth the vast difference in the essential character of the two systems of government.

In support of progressive taxes, it is sometimes argued that the federal income tax during the Civil War was graduated. There is, perhaps, a difference in principle between a progressive tax on the income of individuals or corporations and a similar tax on their property or principal. The writers on economics seem to think so. The one tax takes part of the income according to the so-called faculty doctrine of the theorists; the other diminishes the principal. An excessive income tax during any period of great necessity would still leave the principal intact; an excessive property tax may despoil and ruin. At any rate, the federal succession or inheritance taxes were not progressive or graduated as stated in the defendant's brief, although the degrees of relationship were classified and taxed at different rates, and the income tax, though progressive, had no such arbitrary and unjust features as we find in the Illinois act. But as Chief Justice CHASE said of war measures: "The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, it found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent."

There is a scheme of public policy inspiring this legislation, a motive prompting these exemptions and this beginning of progressive taxation. Certain writers and philosophers, as well as the socialists, are not at all satisfied with the distribution of wealth as they find it in the world to-day. They would remodel society, level fortunes, limit acquisitions, redistribute wealth.

They argue that this should be done by limiting inheritances and testamentary dispositions. Chancellor Kent refuted these writers in some of his eloquent passages, and showed that human society would be in a most unnatural and miserable condition if it were possible to be instituted or reorganized upon the basis of such speculations, and that as long as society is constituted as it is the right of acquisition and of property ought to be sacredly protected. A few years ago an act was introduced in the Illinois legislature limiting the amount any person could inherit even from a parent, and forfeiting or escheating the surplus to the state; but the attempt then failed. Or was it only postponed?

Nor is redistribution of wealth or equalization of property a legitimate consideration of public policy in any form of tax laws. Twenty-two years ago, in the famous seed case, Mr. Justice BREWER, speaking from the bench of the Supreme Court of Kansas (*State v. Osawkee Township*, 14 Kans., 418, 422), said, in language so applicable to the present discussion: "Such taxation would be simply an attempt on the part of the state to equalize the property of its citizens. * * The mere mention of these questions suggests the dangers which would follow the adoption of this as a rule of public conduct."

If the state can as to decedents' property reserve to itself or confiscate the surplus over a fixed amount, what must it do with the property so reserved or confiscated? Must it redistribute the property; or may it accumulate so as in time to become the universal owner of all property? The history of every country has proved that no better device could be imagined for checking

industrial progress than any such policy of veiled confiscation tending toward state ownership. As Nicholson admonishes us in his book on "Historical Progress and Socialism": "It would introduce a creeping paralysis; and, when the time was considered ripe for taking over the land and capital, the land would be a wilderness and the capital old iron."

I have now stated generally the questions to be considered and the grounds upon which we urge that this act of the legislature of Illinois shall be declared unconstitutional. The decision for which we plead will not tend to lessen the taxing powers of the State of Illinois or to cripple or embarrass it in the collection of needed revenue. The act can be remodeled upon a fair and reasonable basis of classification. The legislature will be left free to impose succession or inheritance taxes at any rate found necessary for the requirements of government. The only limitation upon its power will be a compliance with the just and wise rule of the fourteenth amendment, which was intended to nationalize on a permanent basis the American doctrine and ideal of equality—equality of burdens as well as equality of rights and duties—and to place it forever beyond the temptation or the power of the states to deny to the lowliest or the richest the blessing and the protection of equal laws.

CLOSING ARGUMENT BY MR. HARRISON.

MAY IT PLEASE YOUR HONORS :

Before addressing myself to the line of argument which I have marked out, it may not be inappropriate to make a reference to the suggestion of the Attorney-General of Illinois—that this law might be held by this Court to be unconstitutional as to the third class, and sustained as to the other classes. We have in this law what was evidently intended to be a system of succession or inheritance taxation. This is one of several classes that the law defines and upon which it levies taxes. It is the class, if your Honors please, least favored; the unfavored class in this legislation; a class described as “all others,” after the two classifications that embrace kinship to very remote limits. It is mostly the stranger who is taxed by this clause. Surely the learned Attorney-General would not ask this Honorable Court to conclude that the legislature of his State would desire that the residue of the statute should be maintained if this part were to be declared unconstitutional. Surely he would not be willing or have us believe that the legislature would have been willing that the unfavored class—the class the legislature was most anxious to tax and to tax most heavily—should escape, while the children and nearer relatives of the decedent are held to be subject to the operation of this law.

There is another feature of the law which, I think I would be justified in saying, after listening to these arguments and reading these briefs, is confessed by counsel to be unconstitutional. There is a feature of it that is not supported by any argument or by any citation which these gentlemen have presented to the Court. They have entirely failed to inform the Court either in the brief or in the oral argument, of the fact that this tax is levied upon gifts and conveyances *inter vivos*, if they are made in contemplation of death, or to take effect after death.

MR. MORAN: They are testamentary in character—

MR. HARRISON: Testamentary in character! Does this honorable gentleman contend that, when one is in life and in the full possession of his faculties, he has no natural right to endow a child by an executed gift or conveyance, taking effect immediately, in contemplation of his own approaching death, but that that act is to be rated and put upon the same plane with the gifts by will of which he has spoken? I know it has been a part of almost every law taxing successions that gifts made in contemplation of death are included. Because otherwise such a law could not be executed. But, does Mr. Moran contend that, being in life and in the full possession of one's mental powers and in the full control of one's property one may not in contemplation of his death take from his safe a package of bonds and hand them to a friend in trust for the maintenance of a minor child, for whose support his estate has been chargeable, upon the ground that the child has no natural right to such support? I understood that counsel, in response to a question of the Court, admitted that the power of the owner over property during

life was absolute. If this be true—and it is plainly true—where is there any authority, where is there any suggestion to be drawn from history or from legal principles, that would put any limitation upon the power of one who is nearing the limit of human life to make provision, by a division of his property, for those whom nature has made dependent upon him? How does the doctrine of a “bonus” for a privilege, as my friend puts it, apply in such a case as that? No right is exercised under the statute of wills or of descents of the State of Illinois or from any other statute. If both those statutes were repealed, the right to dispose of property during life would remain. I take it for granted that there is no answer to that suggestion, or it would have been made.

MR. MORAN: If it had been made earlier it would have been answered.

MR. HARRISON: This provision is written on the face of the statute, and no argument by which you have supported an inheritance or succession tax includes these transactions *inter vivos*. How could the State escheat such property? When the black-robed usher is seen on the distant hill, does a state of incapacity to dispose of property begin at once? Are men to be restrained from giving exercise to those natural affections with which God has endowed them, and from the discharge of those duties which the domestic relations lay upon them?

A succession or transfer tax may be supported upon principles that may well include gifts and conveyances *inter vivos*, if there be nothing in the constitution of the state to prohibit it—if it be not a tax on property, or be not unequally laid. We are not here to deny that the

state may, as the United States did during the war, lay a tax upon conveyances and transfers *inter vivos* and upon testamentary conveyances or dispositions and upon inheritances.

I have answered sufficiently, I think, the suggestion that a part of this law may be stricken out as unconstitutional—the tax on strangers—and the tax on the near relatives be preserved. Your Honors know that that was not within the contemplation of the legislature of Illinois; and that this law as to ante-mortem gifts cannot be supported upon the propositions the gentlemen have contended for.

It may be true, as the opposing counsel have suggested, that we should apologize to the Court for occupying its time in discussing the questions whether there is a natural right of inheritance, or a natural right of testamentary disposition. But if your Honors please, I think if we will pause for a moment to contemplate the condition in which society would find itself if this monstrous power for which my friend contends were exercised by the legislature of any of our states, we would find a justification for this discussion. In forming their institutions, their national government and their state governments and constitutions, our people were careful to insert in bills of rights or in the bodies of their constitutions many limitations upon each of the departments of government. And, if your Honors please, these bills of rights are not subject to the rule "*expressio unius.*" That rule may apply to grants that are made and to powers that are conferred, but surely this Court will not say—it has often said the contrary—that there are not

rights reserved to the people beyond and above the special reservations of the constitutions and the special declarations of the bills of rights. There are things that are inherent in our system of government; that were born with our very institutions: rights of property; rights of persons; rights that do not find such expression—do not need to find such expression. As to tax laws and as to all laws affecting individual rights and liberties, the laws that are made by our states are to be read in the light of the fact that our government was builded and established for the protection of the individual, and upon the principle running through every part of its structure that men shall be equal before the law—an equality of rights and burdens.

Now let us suppose for one moment that the State of Illinois should repeal its law of wills and its law of descents. My learned friend thinks they may do so without violating any right. He thinks that it would not be an immoral thing; that it would not infringe any natural right; that it would not be a thing that could be condemned upon any principle of human justice or right, if they were to repeal those laws and, by eliminating all heirs, bring into force the doctrine of escheat and so take to the state all the property within its borders owned by its own citizens, and all the property within its borders owned by citizens of other states. No immorality, no natural right transgressed, nothing that should be shocking to our natural instincts, nothing inconsistent with the principles of free government! That is the doctrine proclaimed here. After all the care we have taken in forming our governments; after all the limitations which we find in the constitution of Illinois—to which I shall

presently refer—requiring that all tax burdens upon property shall be equal; after all those limitations for the protection of the individual, that no man's services and no man's property, however insignificant the amount may be, shall be taken without due process of law and without compensation—after all those precautions intended to secure men in their property rights—have things been left by the carelessness of our statesmen in such a position that a casual and communistic legislature of Illinois may take the entire body of individual property, which has been guarded so carefully in other particulars at the death of each owner? Have we constructed our system of government upon a principle that leaves it in the power of each legislature to establish state ownership of all property? Have we been careful about small fractions and yet left the body of our property rights, and our most cherished social and family rights, in such a condition that the legislature of a state has the power to destroy them all without guilt or moral dereliction or the transgression of any natural right or political principle? Is that the situation we are found in?

MR. JUSTICE BROWN: Suppose the legislature of Illinois should do that, and a man should die leaving a wife and father and mother and brothers and sisters—

MR. HARRISON: Will your Honor allow me to interpolate child?

MR. JUSTICE BROWN: No; I would like to have an answer to the question as put. In what proportion would you divide the property?

MR. HARRISON: I shall come to that after a while, if your Honor will allow me. I do not say that these nat-

ural laws have all been written out; that the details of them are expressed. That is for the legislature to do. The Federal Constitution, in recognition of these natural laws, established beyond cavil the natural right of property. By so doing it established, as essential attributes of property, the natural rights of inheritance and testamentary disposition; and to the states was wisely left the discretion of choosing between them according to state policy. But it is not an arbitrary discretion; it is one that is to be exercised on the lines of nature and those family obligations and relations which have characterized its exercise from the beginning. It is not necessary to inquire within what degrees of relationship natural rights of inheritance may be confined, nor is it necessary to declare that such rights may not extend to the remotest relations. That there may exist amongst near relations various degrees of natural rights, and that different rights to acquire by inheritance may be accorded to different degrees of distant relations, are self-evident facts. These instances present essential differences furnishing a just basis for classification. But, if the statutes of wills and descents should be repealed, this Court would find some sound basis of protection in the revival of the doctrine of *post obit* gifts and conveyances or in the doctrine of family ownership. These statutes of descents and wills are but the evidence of presumed and effectuated intention.

Let us look a little further. May I ask my learned friend if the matter of heirship is so purely arbitrary whether the last legislature of Illinois might declare that the members elected to that legislature should be the heirs to the property of all persons dying within the State

of Illinois. If the designation of heirs is purely an arbitrary thing; if the child has no natural right, nor the wife, nor the brother, and the legislature has absolute power and arbitrary discretion, as he has told us, why may not the legislature name its own members as the heirs? If the sessions of the legislature are biennial, they might take unto themselves a good deal of property before the statute could be repealed. The doctrine is stated just as broadly as that. The legislature may do what it pleases; may take it all. There is no natural or fundamental right. They may name anybody to be heir, or they may name no one. And yet, if your Honors please, I think the courts would find some way to dispose of legislation that names strangers as heirs, and cuts out those nearest of kin. Does my honorable friend believe that the courts of Illinois would sustain a statute of descent that shut out child and wife and substituted strangers to be heirs to the estate? I cannot believe that he does or that he would affirm such a power in terms. And yet his whole argument imports that the power is just as despotic and arbitrary as that. What has become—what will become—upon this theory, of all our classification of real estate titles? What kind of a fee simple did the gentleman have in mind when he said that the owner could only hold for life; that no heir could take it; but that he might during his life give it to some other man who might hold it during his life? What did those old patents of the United States, under which all the land of Illinois is held, mean, when they granted a section or a quarter section of land to those hardy settlers and to their "heirs and assigns forever?"

MR. MORAN: Could not he alienate it?

MR. HARRISON: Alienate it? Of course. So could any grantee alienate it. But the fact that it was inheritable—that if he died without disposing of it and without making any testamentary disposition of it, it should go to his heirs—was a part of the grant. But it is said those heirs were not defined in the patent. It did not say his children; it did not say his wife; it did not say his brother. That was left to those modifications and regulations which the conscience of the states and the character of their political and social and property organizations might justify the legislature in making. It did certainly involve something more than a life estate which might be transmuted into the life estate of somebody else at the pleasure of the state and taken at last absolutely by the State. Can the title given by the United States be cut off by the State of Illinois by its refusing to define who the heirs shall be, and so taking the property to itself? Such a doctrine as that would paralyze all thrift and industry. Why should men work and wear out their strength in accumulating property if it has no family perpetuation? Suppose such a law to be enacted in Illinois as the gentleman defends; would not the universal rule of the state be "Let us eat and drink, for to-morrow we die?" All of the stimulus of thrift would be destroyed by the admission of such a doctrine as that. What is it that makes a father careful? He has married a wife; he has brought a child into life, and his care of them is not limited by his own life. The care and the duty project themselves beyond his grave; and he feels that he must—not that it is a privilege, but a duty

growing out of the family relation—that he must make provision for them. Does the gentleman believe that a man may not provide for his infant child when he dies; that every child is to become a foundling dependent upon the charity of the state?

MR. MORAN: This is not the sort of law you are attacking.

MR. HARRISON: I am attacking a principle that you have set up to support this law; the ground upon which you defend this arbitrary and unequal legislation, that a state may, without any breach of natural law or denial of fundamental rights, take to itself all property. I will speak of this particular law presently. You can only defend and uphold this law by this principle which you have proclaimed with such assured confidence. I am trying now to show the Court what effects the application of this principle would have upon the communities in which we live. The family relation would be broken; whatever obligation, whatever bond of duty, the expectancy of property places upon the child would be broken. The parent would have no motive to accumulate. The wife would be without provision. American society, American institutions are founded on the American home in which the father and protector of the family is also its provider; and not its provider only while he lives, but is to make for the helpless and dependent a provision which they shall enjoy when he dies. Are all the benefits that come to the state from family association, traditions and descents to be destroyed? Here stands a venerable man who has accumulated property through years of toil. Death draws near. The pulses of life beat slowly and

with the courage of a Christian faith he looks into the grave. But he may not call his son and bestow upon him the heirlooms of the family. He may not take from above the mantel shelf the sword he wielded in his country's defense and put it into the hands of his stalwart son that he may, in his generation, wield it also for his country. The state is to take it all. There is no natural right. The heirlooms, the old homestead, hallowed by family associations, the place of birth that has in it not only so much of sweetness but so much of wholesomeness and restraint—these go to the state. Its agent, the moment the spirit of that faithful man has taken its flight, steps into that abode and lays his hand upon all these things and carries them off to be at the disposal of the legislature of Illinois. Our social state, the property relation as we esteem it, all our business is builded upon the idea that a man's children and kin shall take that which he has accumulated. Can it be possible, I repeat again, after all the care we have shown, in protecting our property and our civilization, that the only thing that stands between us and an absolute state of socialism is the passage of a law that any casual legislature of Illinois may enact?

I have, as doubtless all the Justices have, tried some will cases. I have no doubt that some of your Honors, upon the benches of the state courts, have instructed juries in will cases where testamentary incapacity was alleged; and what is the test? First, did the man have sufficient memory and intelligence to recall his property, to know his possessions; and secondly, did he have sufficient intelligence and memory to recall those who had natural

claims upon him and to measure their just deserts? What has been meant by the courts in these instructions? So thoroughly has this doctrine of the right of a child ordinarily to inherit, subject to testamentary dispositions and to apportionment in particular cases, where the love or the duty or the service rendered by one child may authorize distinctions—so thoroughly has this idea been instilled into the minds of what Mr. Lincoln called “the plain people,” that if you go into your own state, sir (turning to Mr. Moran), and empanel a jury to try such an issue and it is proven that the testator had declared his views of the family relation and of his obligations to be such as have been proclaimed here, the jury will find the testator to be non compos—incapable of making a will. The man who would say in connection with the making of a testament, that he did not think anybody’s children had any natural right to share in a father’s estate; that they stood in the same relation as strangers—

MR. MORAN: Would he not have a right to give all his property to strangers?

MR. HARRISON: Undoubtedly, if he was of sound mind. But in all such cases these tests would be applied; and in that case it would be asked how he came to give it all to strangers. If it could be proven that he had said, in connection with the making of his will, what has been said in this Court, there is not a jury in any of our states that would not return a verdict that he was of unsound mind. Such a verdict would be inevitable under such instructions as the courts give in all these cases, viz.: that the testator must appreciate the natural claims upon him. Does the gentleman say there are no natural claims? Has

the wife no natural claims? How does it come, then, that in your state, sir, as in mine and in all of the states, I think, the provision made by law for the wife takes precedence of creditors? There is a share of the estate set apart to her that cannot be touched by creditors. Will the distinguished gentleman tell me upon what basis that allowance can be sustained if she has no natural claim? The creditor has, he will allow, a claim that justice must recognize; but I do not know how a creditor would realize his debt if administration was not regulated by the states; I do not know how a man could recover property that was taken from him in life if the law did not provide writs of replevin and sheriffs. Because these things are provided by legislation it does not follow that the legislation may be arbitrary, or the rights given or regulated be taxed as privileges. It is an old maxim of the law that no one is heir to the living; but we have had an extension of the maxim.

The conclusion would not follow, however, even if this monstrous doctrine were admitted, that this law is valid, because the state must deal with all its citizens, not only in tax matters, but in all matters of grace and privilege, upon principles of equality. The grace of a Republican state is not a whim. An Eastern despot may take property from one and give it to another upon a whim, but the legislature of Illinois may not take or give in that way. When it attempts to show its grace in the matter of testamentary disposition it cannot create arbitrary classes and consequent inequality; its grace must proceed upon that principle of equality which must pervade all legislation.

The basis of citizenship—the political relation on which

our Government is founded—is that of equality of burden and of right. All men may be required to contribute of their property to the state; if it is necessary for the public service, they may be called upon to give their lives for the state—but it must be proportionately and upon some principle of selection—by lot for the draft; by rate and apportionment, if property is to be taxed. You may not take at one rate from one and at another rate from another of the same class; you may not exact a higher rate from one than from another. You may make taxes ratably upon some principle of proportion and equality. The intent to reach that end must be found in every valid tax law. I do not say that the law must or can be perfectly equal in administration. I do not say that inequalities may not arise, of a minor sort, under every tax law; but I do say that the aim and the purpose of such legislation must be to put an equal burden upon every citizen who is called upon to contribute. This principle is the very breath of our free institutions. What other defence has the minority, if, as is claimed in this case, a tax upon successions may be fixed at any amount and be limited to particular classes, based on value or wealth? The whole revenue of the state might be levied in Illinois upon a score or two of people, and all the rest of the population exempted from any burden of taxation.

I do not contemplate with satisfaction the accumulation of great wealth in the hands of a few individuals; but to prevent it I would not destroy the very foundations upon which our institutions rest. Least of all can those who have not wealth consent that there shall be introduced into our tax legislation an arbitrary principle that may assess

burdens now for the purpose—I think disclosed in the brief and confessed in the argument of the honorable counsel, to be one of the objects of the law—of dispersing property, for this arbitrary power will at another time turn and rend those who install it. As we have said in our brief, during the French Revolution they classified one degree of wealth as “superfluous” and took it all. I submit to my friend and to every right-thinking man whether we should not pay a fearful cost for the small relief we might get from tax burdens if we should introduce into our legislation a principle like that for which he contends. This equality of burden, making every man, according to his means, a contributor to the expenses of the state, is one of the most wholesome things in our civil institutions. It is the paying citizen who is the watchful citizen. What would the people of Illinois care what expenditures were made by the legislature if the entire amount were levied upon twenty wealthy men in that state? The best assurance of watchful care and interest in our institutions; the best assurance of honesty and integrity and economy in public expenditure, is in a wide distribution of the burdens of taxation—because the man who pays watches.

The provisions of the constitution of Illinois upon the subject of equality are very explicit and very full. I do not think the constitution of any of our states contains any more careful provision for securing an equality in taxation. As to property taxes, it requires that every person and corporation shall pay a tax in proportion to the value of his, her or its property. As to some specific callings which are named and among which we find the words “franchises” and “privileges” it is required that

the tax shall be uniform as to the class upon which it operates. The legislature is then given power to tax other subjects, but only in such manner as is consistent with the principles of equality fixed by the preceding section.

The Supreme Court of Illinois has said that it is a privilege that is taxed by the law under consideration. Your Honors will not think so when you read the law. The law, I think, clearly levies a tax on property. I know there have been decisions in these succession tax cases wherein it was said that because a lien for the tax is created on property that does not make it a property tax ; but here every expression in the law shows that it is a property tax. The word "privilege" is not found in the law. What does it say? "All property, real, personal and mixed, which shall pass by will * * shall be and is subject to a tax at the rate of one dollar on every hundred dollars." That is what the law says ; and not only that, but at another place it says the tax is to be on the value of this property. Running through every section of the law, the taxing section as well as the sections relating to administration, is the declaration that it is a tax on property. In the case of *Maine v. Grand Trunk* and I think in the *Home Insurance Case* and others, this Court have held taxes not to be a tax on Interstate Commerce, because the law said it was a tax on the franchise ; and if it had not been for that declaration your Honors must have held in the one case that it was a tax on earnings, and in the other on property. Here we have a law that declares the tax levied to be a tax on property, not once, but many times ; and as such it is subject to the

rule of uniformity to which I have referred in the constitution of Illinois. All these provisions for equality are now guaranteed by the United States in the Fourteenth Amendment. As Professor Burgess says, the United States, by the passage of that amendment, ceased to occupy the position of a mere "passive, non-infringer of individual liberty," and assumed the position of "an active defender of the same against the tyranny of the Commonwealths themselves."

I shall not attempt to discuss the breadth and reach of that great amendment. It is enough to say that for protection against the passion of the state, against any temporary movement that may wrest the people or the legislature of a state away from this great rule of equality and fairness to which I have referred, we no longer rest solely on the guarantees of the State Constitution, but on the Federal Constitution as well.

The ordinary tax which our states have used is the property tax and my friend defends in part the method of taxation introduced by this law upon the ground that at death the state can lay its hands upon property which during the life of the owner has avoided taxation by false returns. I recognize and condemn quite as strongly as my friend this secreting of property from the public assessor. It is a crime against the state; and the man who hides his property in order that it may escape its fair share of the public burdens is a malefactor. He is of kin to the man who skulks when the call comes to fight for his country; and the man who dodges about from one state to another to escape taxation is of kin to the man who sought Canada during the civil war in order to avoid

a patriotic duty. There is such an evil—a very great one—but it is not to be cured in this way. Are we to admit that our legislatures and our administrative officers are inadequate to the duty of preventing the secreting of stocks and securities from the tax list? I do not think any legislation can be too severe that will bring the recreant citizen to his duty. I have no patience whatever with this too much talk about the privacy of one's own affairs—that the state must not inquire into private business. Under our association as citizens we are partners. We have come under obligations to share equally the burdens of government; and you have a right to know whether I am paying my share or not. You have a right to demand that I shall make a disclosure of what I have. I should not think it too severe a penalty for this prevalent offense if, in the exercise of their rightful power, the legislatures were to enact that a legatee should not take any property that the testator had fraudulently concealed from the assessor. If one repudiates the ownership of property for a series of years in his tax returns it might very well be regarded as an estoppel when the legatee claims it. But the law now under consideration is not a remedy for the evil.

The Massachusetts Tax Commission have recently submitted a report to the Governor of that state recommending that the property tax, by reason of the difficulty of collecting it, should be abolished, and an inheritance tax and some other taxes substituted. My friend would not agree to the abolition of the property tax, and he would be right. A succession tax ought not to be made a substitute for the personal property tax. The faults and

defects in the administration of one law ought not to be the reason for enacting another founded on inequality. The proposition for which we contend does not shut out the State of Illinois from levying an equal and fair tax upon inheritances and successions unless it is a property tax, and so double taxation under the Constitution of the State. The gentleman does not speak to the record when he intimates that we represent people who desire to be exempt from any tax. Those we represent, and in that they represent the common interests, are only anxious that this tax shall be put upon a basis of equality and predicated upon a principle that is not destructive of all our social relations and all our property interests.

As to exemptions, the gentleman says, with great emphasis, What is reasonable? Who is going to say? Well, how does the legislature say? It is bound to make them reasonable. It is under precisely the same difficulty that the Court is. There is no fixed rule. We cannot say that only so much may be exempt in any case; we must look at the amount of an exemption and see whether it is one that is established for a public purpose; whether there is a public reason to support it. In other words, everybody should be interested that the exemption be made. It should not be a favor to the class or individual exempted. The exemption should rest upon some public consideration that would authorize it as in the interest of all. For instance, upon the theory that it may cost more than it is worth to collect it, or upon the theory that by taking from those of very small means we are liable to take from them the power to make a living and thus throw the burden of their support on the community.

But when exemptions are plainly resorted to for favoritism; when they are based upon individual favor and a bonus to the majority, and not upon any public consideration; when it appears that they are used as a means of classifying by values, then this Court will say, that while there is a legislative discretion to do what is reasonable, that is not reasonable and we will not sustain it.

As to this exemption of \$20,000 to each legatee of the first class. It might result in exempting an estate of \$250,000 wholly from taxation if there were heirs enough to take it in portions of \$20,000. That is the method of classification here; it is nothing more than a class favor. It does not rest upon and cannot be supported by any public consideration whatever. It is a system of classification upon values. Now it is interesting to note, as we pass, that the constitution of Illinois, as to the tax upon property, does not allow the exemption of a dollar—not even the dray and the old horse that draws it. So exacting is the law that every man must pay according to the value of what he has. The tax gatherer gets his returns if it is only ten dollars. The constitution allows the property of churches and schools and property used for charitable and such like purposes to be exempted; and the Supreme Court of Illinois has held that this provision excludes the power of the legislature to exempt anything else or any other person from taxation; that the legislature of Illinois cannot exempt so much as ten dollars, under the constitution of that state, from the property tax. When we look at the exemptions in this law we see that they were manifestly conferred as favors; that they were resorted to as

means of classification; that they cannot be rested upon any public consideration; that they were intended to free the great bulk of individual property and of individuals from any tax.

As to these exemptions and their character, a word or two more. There is a curious sort of classification here. The first class consists not only of lineals ascending and descending, but of collaterals. It embraces brothers and sisters. To that class there is allowed, to each person taking a legacy or an inheritance, an exemption of \$20,000. The first class includes father, mother, husband, wife, child, brother, sister, wife or widow of a son, or husband of a daughter, or any child or children adopted, or any lineal descendent born in lawful wedlock. So that if there were twenty legatees an estate of twenty times \$20,000—or \$400,000—would be wholly exempted. Upon what principle can this be justified? The answer in the appellee's brief and in the oral argument is that the legislature may do that in order to disperse estates. It is a curious fact that in the second section of this act, in attempting, as it seems to me, to repeat the description of the first class, certain members of that class are left out. I refer to the provision in reference to life estates in the second section. Some have been left out, I think, inadvertently. I wish your Honors would look at that second section. All life estates devised to father, mother, husband, wife, brother, sister, widow of a son or a lineal descendant of the testator, with a remainder to a collateral heir, are exempt. In the first place, I want to call your Honor's attention to the amount of that exemption. An estate for ninety-nine years or longer, as Mr.

Guthrie has said, given to one of the persons named, though it might be worth \$50,000 a year in rentals, and in its aggregate value millions of dollars, goes wholly without taxation. This is the most senseless and incongruous provision that I ever saw in a public statute. The remainder must go to a collateral or to a stranger in order to free the life estate or estate for years from the tax. If then a man left a life estate to his child and the remainder to his grandchild the life estate would not be exempt, but if the remainder were given to a nephew it would be.

MR. MORAN: I think you misinterpret the law.

MR. HARRISON: I am sure I do not. Let us read it. "When any person shall bequeath or devise any property or interest therein or income therefrom to mother, father, husband, wife, brother and sister, the widow of the son ('the wife of the son' is left out) or a lineal descendant during the life or for a term of years or remainder to the collateral heir of the decedent, or to the stranger in blood or to the body politic or corporate at their decease, or on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax." What is the condition? The life estate to one of the persons named, the remainder to a collateral. Does it not say so? Will the gentleman tell me what other possible interpretation there can be? I am sure you will see, when you read it, that the life estate is only exempt when the remainder goes to a collateral, but that is only one instance of the incongruity of the law. In addition to the \$20,000 there is given to this class an exemption of property that may run up into the millions in value. How can that be defended? Only upon the principle announced

by appellee's counsel that it is not a tax at all—that it is a “bonus,” and that a bonus is not subject to the law of equality. They say to people of this class: We will let you devise life estates of any value free of tax, but if you want to devise anything else—any other form of title—of less value, you must pay a tax. We have here exemptions that constitute classifications of property that are based upon favoritism, and upon no possible public consideration.

I now come to the progressive features of this tax. I do not suppose that any lawyer would defend a progressive tax on property in Illinois. It is defended only on the ground that succession is a privilege, like a franchise to a corporation, as if each of these persons were coming to the legislature and asking the privilege to take as heir or legatee. If it cannot be supported upon that ground, and is not also free from the further limitation I have suggested, that even acts of grace must be uniform, then progressive taxation will find no defense. I have shown that in the Constitution of Illinois the idea of uniformity, of an equal rate, is the dominant thought in the tax provisions. Upon what principle can it be said that a man shall be discriminated against in this succession tax to the amount of \$100 because he gets one dollar, or even fifty cents, more than somebody else? If there is an increase of rates it should only be on the increased amounts, the same sum paying always the same rate. There should be so much on the first ten thousand and so much on the second, if any progression is allowed, and that is an extremely dangerous policy. But when you carry the increased

rate back so that the six per cent., payable on estates of over \$50,000, is assessed not only on all above that amount, but on the first \$10,000 that is taxed at three per cent. and the \$20,000 that is taxed at four, we have a gross abuse of the power of classification.

I want to say a word about classification, and then I will close. The Supreme Court of Illinois says this law makes six classes; two are classifications of persons upon the basis of kinship, and four are said to be classifications of property on the basis of value. We admit the principle that the legislature may classify relationship for succession taxes, and that only uniformity in the class is required. But if the basis of classification may be value or wealth, you have opened the way to absolutely arbitrary and unrestrained taxation. You have broken down every requirement looking to equality in the Constitution of Illinois and in the Fourteenth Amendment. You have made nugatory this great charter, the protection of which we are asking. This doctrine of classification appears in other matters than tax cases. In many of the states we have laws requiring legislation to be general, and the courts have said that it is general if it applies to a class—as to cities of a certain population. Upon that basis we have had legislation with reference to cities of the first, second and third class—according to population, but always so that a city of the second class may come into the first class as its population increases. In the *Gulf and Colorado Case*, where a special attorney's fee of only ten dollars was levied in certain suits against railroad companies, the Court said: "You have not adopted an admissible classification; it does not appear that there is any

reason why railroad companies should pay a docket fee in certain cases and nobody else," and the Court declined to assume that the legislature might have some reason for such a classification. It was not classification, and the law was declared to be in contravention of the Fourteenth Amendment. The doctrine declared over and over again, under the Fourteenth Amendment, is that the legislature is to *find* classes, not *make* them. They are like the poets, born and not made. There must be some natural distinction and division; something that actually exists before the legislature acts. In this case the Supreme Court of Illinois has justified a classification based only on wealth; and if you admit that as applicable to general taxes, then I repeat that every provision intended to secure equality is destroyed, because of the evasive and illusive answer that it is equal within the classes, and upon a division that the legislature has chosen to establish.

It seems, then, to me—and I have not had opportunity or time to read to your Honors the numerous citations which appear in our briefs—that this right of inheritance and of testamentary disposition is natural and fundamental, in the sense we contend for. Blackstone—and that expression of his has been at the root of all the foolish talk that has been indulged in—speaks of an utterly unorganized state, when there was no society at all, no civil government, no control, each man for himself. He said that in a state like that it did not seem to him that the child had a natural right to take the property of the parent; that when a man died his property was *res nullius*, and whoever got it had it. Possession and the power to hold it was ownership. It is

because there is no law that he keeps who can; he gets who can. But the authorities we have cited show that from the dawn of history in the earliest records, both these rights existed—the testamentary right and the right of inheritance. The right of disposition is an incident of property. Property is the right to possess, enjoy and dispose of a thing. The testamentary right seems to me to originate in the very nature of property and to be an incident of it. The right of inheritance goes back to the beginning, and these two great natural rights have come down to us—sometimes this one restrained and the other given greater scope; now the testamentary right extending only to a third of one's estate; now to all; and now the testamentary right limited in favor of the widow, so that her portion might be secure. These great natural and fundamental rights are both recognized; and though neither of them is written out on tables of stone, they are both engraved on the fleshly tablets of every man's heart. They have both come down to us from the earliest dawn of history. It does not militate against our proposition that these are natural rights because there seems to be a conflict between them. The one cannot wholly prevail without destroying the other. The statute of descents, as the Courts have said again and again, is the expression of the legislature upon its conscience and duty as to what is the natural law—as to what should be the natural intention and desire of a testator. The legislature, taking no account of the particular family relations in which service and duty, or insubordination and rebellion may swerve the application of this right one way or the other, defines it as applied to gen-

eral cases. The family relation and property rights have been built up and stand upon these two great natural rights. The legislature does not give them; it defines them. Perhaps primogeniture was quite natural in feudal times. There must be one head of the castle, that the duty to the king might be discharged and the defense of the castle made good. In every state of society there is this reason or that, why some preference shall be given to one or to the other; but both have survived and will survive as natural rights. When they cease to be recognized as natural and fundamental rights, we shall have dissolved the basis on which society rests.

No. 425, 463 & 466

FILED,
MAR 23 1898
JAMES H. MCKENNEY,
CLERK

ILLINOIS INHERITANCE TAX CASES.

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOSEPHINE C. DRAKE ET AL., Executors, &c., <i>Plaintiffs in Error,</i>	} No. 425.
<i>vs.</i>	
DANIEL H. KOCHERSPERGER, County Treasurer, &c., of Cook County, Illinois.	

ELIZABETH EMERSON SAWYER ET AL., Executors, &c., <i>Plaintiffs in Error,</i>	} No. 463.
<i>vs.</i>	
THE SAME.	

JESSIE NORTON TORRENCE MAGOUN, <i>Appellant,</i>	} No. 464.
<i>vs.</i>	
ILLINOIS TRUST AND SAVINGS BANK, as Executor, &c., of Joseph T. Torrence, deceased, and DANIEL H. KOCHERSPERGER, County Treasurer, &c.	

OPINION OF SUPREME COURT OF MISSOURI HOLDING UNCONSTITUTIONAL
LAW IMPOSING GRADUATED SUCCESSION TAX.



Supreme Court of Missouri.

IN BANC. OCTOBER TERM, 1897.

THE STATE OF MISSOURI EX REL. Executors of the
Last Will of John C. Conley,

Relators,

vs.

LEWIS M. SWITZLER, Judge of Probate Court, Boone
County,

Respondent.

GANTT, C. J.: This is an original proceeding in this court for a writ of *certiorari* to the judge of the probate court of Boone County, commanding him to send up the record of his proceedings in the matter of the assessment and levy of a collateral succession tax upon the estate of John C. Conley, late of said county, deceased.

The writ was issued and made returnable to Division No. 2 of this court, but owing to the importance of the questions involved and the fact that a similar writ had also been issued upon the application of L. R. Wilfley, executor of Susan E. Spear, against Judge Rassieur, judge of the probate court of the City of St. Louis, returnable to the Court *in Banc*, this cause was transferred to Court *in Banc*, and the records of the Probate Court in each case having been removed into this court, the two cases were heard together upon a motion to quash the proceedings for want of jurisdiction in said courts to assess and levy said collateral succession tax.

John C. Conley died in Boone County, Missouri, on the 6th day of December, 1896, leaving an estate consisting of realty in this and other states and of bonds, notes, certificates of stock and other securities.

His will, dated February 18, 1896, was duly established and admitted to probate by the probate court of Boone County on the seventh of December, 1896.

The said testator was never married. He made a bequest of twenty thousand dollars for charitable purposes, and gave the remainder of his estate in different amounts to his collateral relatives. He gave some special legacies of a certain amount, and, after the payment of various special bequests, the residue of the estate is given by his will to certain nephews and nieces named in the residuary clause.

Letters testamentary were duly issued to the relators, who qualified as executors of the will on the fifteenth of December, 1896, and filed their inventory on the eleventh of January, 1897.

The probate court, on the thirtieth of August, 1897, entered an order of record, reciting the death of said John C. Conley, the probating of his will and setting out the terms thereof, the date of letters testamentary and of the filing of the inventory, and over the protest of the relators (who waived formal notice of the proceedings, but objected to the right of the court to make such assessment), proceeded to fix the value of said estate, for the purposes of the collateral succession tax, under the Act of April 1, 1895, and the amendatory Acts of 1897.

The court found that the sum of \$20,000 was given by the will to trustees for charitable purposes; \$18,391.31 of the estate will be required to pay the debts of the testator (so far as appeared up to the date of that order) and other legal demands; that the real estate in the State of Missouri was of the value of \$45,660, and that the personal property of the estate was of the value of \$182,919.34, making a total valuation of \$228,579.34.

The court deducted from this amount the sum of \$20,000 given for charitable purposes, and \$18,391.34 required to pay debts and expenses of the administration, and held and determined that the clear market value of all of said property, subject to such tax, was \$190,188; and that said amount was subject to the payment of a collateral succession tax of five dollars for each and every one hundred dollars of such sum up to ten thousand dollars, and twelve and a half dollars for every one hundred dollars in value in excess of said sum of ten thousand dollars.

Eighty-five shares of stock in the Bank of Hico, Texas, of the par value of \$8,925 was included in the above valuation. The court then levied and charged said estate with a total tax of \$23,023.50 and ordered the executors to pay the same. All these facts appear upon the face of the record of the probate court. A similar state of facts exists as to the tax on Susan E. Spear's estate in all material respects.

The constitutionality of the Act of the General Assembly of Missouri entitled "An Act providing for the endowment of the State University, and for the establishment and endowment of free scholarships of merit therein in each county," approved April 1, 1895, and of an Act of the General Assembly entitled "An Act to amend an Act passed by the 38th General Assembly of the State of

Missouri entitled 'An Act providing for the endowment of the State University and for the endowment of free scholarships of merit therein in each county ;' by adding a new section after Section 1 of said Act to be numbered Section 1a, which new section shall read as follows," approved March 16, 1897, is directly assailed in and by these proceedings.

The proposition of relators is that both the Act of April 1, 1895, and the amendatory Act of March 16, 1897, are void because in conflict with various provisions of the Constitution of Missouri and the fourteenth amendment to the Constitution of the United States.

No question is raised as to the power of this court by *certiorari* to supervise the proceedings in the probate courts, and if their action in levying said taxes is found in excess of their powers, to quash their proceedings, and we have no doubt of our power to do so.

At the risk of being deemed prolix, we will insert so much of the acts as bear directly upon the questions raised.

The act was passed in 1895, and amended by two acts passed in 1897. As amended, it provides, among other things, as follows :

SECTION 1. That all property conveyed by will or by the death of an intestate to any person other than the father, mother, husband, wife or direct linial descendant of the testator or intestate, except property conveyed for some educational, charitable or religious purpose exclusively, shall be subject to the payment of a collateral succession tax of five dollars for each and every one hundred dollars of the clear market value of such property.

SEC. 2. That, in addition to the fees now provided by law, no corporation shall be organized under the laws of this state, and no foreign corporation shall do business in this state unless the incorporators shall, upon filing the articles of association, pay to the state treasurer, in trust for the State of Missouri, to be disposed of as hereinafter provided in this act, the sum of twenty-five hundredths of a dollar for every thousand dollars of the capital stock of such corporation as a franchise fee ; and a like franchise fee shall be paid in the same manner on every thousand dollars of the increase of the capital stock of any corporation.

SEC. 3. That every manufacturer of patent medicines shall annually pay a license tax of twenty-five dollars.

SEC. 4. That all moneys which may hereafter escheat to the state shall be distributed in the manner provided by this act.

SEC. 5. That all taxes, fees or moneys received under this act by any county official shall be paid during the first week of the follow-

ing month to the county treasurer, who shall credit three-fourths to a fund hereby created, to be known as "the state university scholarship fund," and remit the remaining one-fourth to the state treasurer; and from all money received directly by the state treasurer under this act, he shall monthly reserve one-fourth, and remit the remaining three-fourths to all the county treasurers of the state, to be credited to "the state university scholarship fund" of such counties.

SEC. 6. That all moneys received by the state treasurer to be retained by him under this act shall be deposited in the state treasury to the credit of the "seminary fund" as provided by law.

SEC. 7. That all moneys received by the county treasurer of each county to be credited to "the state university scholarship fund" shall be forever kept and preserved as a sacred permanent fund, and shall be invested and loaned in the manner provided in this act.

Sections 8, 9 and 10 of the act are in the following words:

"SEC. 8. The income of the moneys in 'the state university scholarship fund' shall be collected annually, and one-fourth of the same added to the principal, and the remaining three-fourths shall be faithfully appropriated for establishing and maintaining free scholarships in the state university, the amounts and terms of which shall be fixed and changed from time to time, as may be necessary, on the written order and resolution of the board of curators of the state university.

"SEC. 9. On the first week of August of each year, beginning with the first Monday after due notice thereof, as prescribed by the county court, in two newspapers of each county, representing different political parties where such newspapers exist, there shall be at the court house, in the county seat, an examination of all applicants qualified under the law to be students of the university. Such applicants shall be actual residents of the county, and such examinations shall be conducted by three examiners, one of whom shall first be appointed by written notice to the county clerk by the president of the board of curators of the university during the month of July, and one selected thereafter by the county court, of another political faith, and the third selected by the agreement of the two so chosen, with power in the county court, or the presiding judge thereof in vacation, to fill all the vacancies in the position of examiner; and such examination shall be written, and shall meet the requirements for entrance in the academic department of the university. Provided, that the duties imposed on county courts

or the judges thereof, by this section, shall be discharged in the City of St. Louis by the mayor.

"SEC. 10. Those applicants passing the best and most meritorious examinations, to the number of scholarships established in each respective county, shall be awarded such scholarships, and be entitled to enter thereon, free of matriculation fees, any department, school or college of the university, *and have paid to them in equal monthly installments, while attending the university, the sum provided by the scholarship so awarded for defraying the expenses of such attendance. Provided, that no applicant shall be qualified to receive such scholarship unless such examiners shall be satisfied that the applicant is dependent upon his own exertions for his education, and financially unable to otherwise obtain the same.*"

By comparison of the act thus revised and amended in 1897 with the original Act of 1895, it will be seen that the progressive feature of the original act—to wit, the increase of seven and one-half per cent. on amounts of over ten thousand dollars—is repealed, and specific provision is added for valuation of inheritances and enforcing the collection of the tax.

Amendments are also made to Sections 2 and 3 in matters not material in the present proceeding, while in Section 5, the basis of the distribution of the funds collected by the State Treasurer in trust under the provisions of the act is altered so that it is made in the different counties on the basis of representation in the General Assembly.

Lying at the threshold of this discussion is the objection which goes to the very substance of this enactment.

It is insisted that the tax provided in the act is not levied for a *public purpose* within the meaning of Section 3 of Article 10 of the constitution of Missouri, which ordains that "taxes may be levied and collected *for public purposes only.*" This provision of our constitution accords with the definition of a tax as expounded by the courts and law-writers of this country.

Judge COOLEY in his work on Constitutional Limitations says: "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."

Judge COULTER, in *Northern Liberties vs. St. John's Church*, 13 Penn. St., 104, said: "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a *public purpose.*"

The Supreme Court of the United States, in *Loan Association vs. Topeka*, 20 Wall., 655, in a luminous opinion by Judge MILLER, after a review of the authorities and a discussion of the power to tax, laid it down as an established principle that, "beyond cavil, there can be no lawful tax which is not laid for a *public purpose*."

In the *Matter of the Mayor of New York*, 11 John., 80, the court said "the word 'taxes' means burdens, charges or impositions put or set upon persons or property for public uses; and this is the definition which Lord COKE gives to the word 'talliage' (2 Coke Ins., 532); and Lord HOLT, in *Carth.*, 438, gives the same definition in substance of the word tax."

Chief-Justice APPLETON in *Allen vs. The Inhabitants of Jay*, 60 Maine, 124, says: "A tax is a sum of money assessed under the authority of the estate on the person or property of an individual *for the use of the State*."

Taxation by the very meaning of the term implies the raising of money for *public use* and *excludes* the raising if for *private objects and purposes*."

Judge JERE BLACK in *Sharpless vs. Mayor*, 21 Penn., 167, says: "I concede that a law authorizing taxation for any other than a *public purpose is void*."

We construe Section 3 of Article 10 of our constitution as a direct inhibition upon the General Assembly to levy a tax for a private purpose, or for the benefit of any private individual. The language used is not susceptible of any other construction.

We shall assume without further comment that if the act under review authorizes the levy of a tax, that tax must be for a public purpose, otherwise it is a direct violation of the constitution of this State. Does it authorize a tax? The learned counsel for the probate judges argues that it is not strictly a tax. He says "although called a tax it is not properly so, but a bonus or price exacted from the collateral kindred and strangers to the blood as the condition upon which they take the estate whose owner is dead."

But even if such a distinction can be maintained, the contention does not reach the vital point upon which the relators insist, namely, that by whatever name this burden, or excise, tax, bonus or exaction from the citizen may be called, still it falls within the purview of the word "taxes" as used in the third section of Article 10 of our constitution.

The word in that section is used in its generic sense as expounded

by lexicographers, Judges and lawyers, long before its use in our organic law.

In the sense that *taxes* can *only* be levied for a *public purpose*, that word includes every character and kind of tax, general or special.

The power of the State to demand such a bonus is referable and referable only to the taxing power, so that whether this "collateral succession tax" as it is denominated by the Legislature, be termed a tax or a bonus, an excise, a price imposed for the privilege of taking an estate by will or inheritance, it must be levied or exacted for a *public purpose only* under our constitution, and under those limitations on the taxing power which exists in the very nature of our free institutions (Miller on the Constitution of the U. S., p. 242). Outside of express constitutional inhibitions there are limitations upon the powers of every branch of our governments, state and federal. Every branch has its limitations short of absolute power.

The Supreme Court of the United States expressed it in these words: "No court would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B." And, in the same case, the court further said: "To lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

That the State of Missouri for public purposes may assess and levy taxes upon the succession or devolution of property under our inheritance laws or statute of wills, subject only to the prohibitions of the constitution of the state and the constitution of the United States, we have no doubt whatever. The constitutionality of such a tax has been too long affirmed by the courts of last resort to admit of doubt; but we have not found, nor have counsel pointed to any statute which has received the sanction of the courts, which levied such a tax for other than a plainly public purpose. Is the purpose for which the act in question authorizes this collateral succession tax a public one? Perhaps few branches of the law have been more carefully considered than that which this inquiry suggests.

The duty and power of imposing taxes is a legislative one, and

the presumption is and must be that the Legislature will only levy a tax for a public purpose, and the courts are only justified in interposing when it clearly appears that the constitution, which is the supreme law governing both the Legislature and the courts, has been or will be violated by the enforcement of the legislative purpose.

What is and what is not a public purpose is not always easily determined.

The Supreme Court of the United States in *Loan Association vs. Topeka*, 20 Wall., 655, states the rule to be, that "in deciding whether in a given case the object for which the taxes are assessed falls upon the one side or the other of this line, the courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and acquiescence of the people may well be held to belong to the public use and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." The Supreme Court of Michigan in *The People vs. Salem*, 20 Mich., 452, with signal ability and thoroughness discussed this question and came to the conclusion that "the term 'public purpose' as employed to denote objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit to follow.

It is, on the other hand, a term of classification to distinguish the objects for which, according to settled usage, the government is to provide from those which, by the like usage, are left to private inclination, interest or liberality."

How these general principles have been applied, reference to the judgments of the courts will best determine.

In *Loan Association vs. Topeka*, 20 Wall., 655, a statute of the State of Kansas which authorized a town to issue its bonds in aid of the manufacturing enterprise of private individuals came before the Supreme Court of the United States, and it was held void because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profits of others and not for a public use in the proper sense of these words.

In *Allen vs. Jay*, 60 Maine, 124, a town at a meeting legally called voted to loan its credit to a firm to the amount of ten thousand

dollars and issue its bonds for that sum, provided the firm would invest twelve to thirteen thousand dollars in a steam saw mill with a run of stone to grind meal and maintain it for ten years, and the Legislature afterwards passed an enabling act authorizing said loan, but the Supreme Judicial Court held the act unconstitutional and void because not for a public use.

All the buildings on a very large portion of the City of Charleston, South Carolina, having been destroyed by fire, the City Council passed an ordinance providing for the issue of bonds by the city to be loaned the owners to build and rebuild the waste places and burnt districts.

The Legislature afterwards, by an act reciting the ordinance, fully confirmed and authorized the issue of said bonds known as Fire Loan Bonds, and certain persons bought them. Afterwards, suit was brought against the city to collect them, but the Supreme Court of the State held said bonds were issued for a private purpose, and void—that the taxing power could only be exercised for some public purpose.

In November, 1872, a great conflagration swept over a large portion of the City of Boston.

The Legislature of Massachusetts passed an act authorizing the City of Boston to issue bonds and loan the proceeds on mortgage to the owners of the land to enable them to rebuild their houses.

The Supreme Court held the act void; that it was not for a public object in a legal sense.

In *Carter's Admr. v. Whipple*, 24 Wisc., 350, the Legislature empowered the Town of Jefferson to raise a sum by taxation, to be paid to the treasurer of "The Jefferson Liberal Institute," a private educational institution, but the Supreme Court held the act void, the tax being for a private purpose, and a like conclusion was reached in *Jenkins vs. Anderson*, 103 Mass., 74.

This court in *Deal vs. Mississippi County*, 107 Mo., 464, held Section 5697 R. S., 1879, void, because it gave a bounty to private individuals for growing forest trees upon their own lands.

In each and all of these cases it was held that the fact that the public might be incidentally benefited by rebuilding a burnt city, the establishment of manufactories and schools, would not sustain the tax.

Every factory, every private school or academy, every industrial enterprise which furnishes opportunity for labor and the earning of wages, benefits a community in one sense, but the *indirect* good

which inures in this way furnishes no basis for taxation of other business to build up such occupations.

Learned counsel for the respondents do not seriously controvert this general proposition, but meet it with the assertion that the State University is a State institution established and maintained for a public purpose. This is at once conceded by the relators because the people of Missouri in their sovereign capacity have recognized and declared in their organic law that "a general diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people, and imposed upon the legislature the duty of establishing and maintaining free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years." Art. II., Sec. 1, constitution of Missouri, 1875. Moreover, by Sec. 5 of Art. II., of the constitution, "the general assembly is enjoined, whenever the public school fund will permit and the actual necessity of the same may require, to aid and maintain the State University now established with its present departments." By Section 6 of the same article of the constitution a fund is provided, "the annual income of which together with so much of the ordinary revenue of the State as may by law be set apart for that purpose" shall be appropriated for the maintenance of the free public schools and the State University.

If, then, this collateral succession tax is levied to support the State University, unquestionably it is for a public purpose.

At this point, however, the real contention in this case arises. Relators insist that the fund sought to be accumulated by this tax is not a provision for the support of the University, but is a tax to raise a fund the proceeds of which must be paid to certain favored individuals to enable them to buy food and clothing for their own use while pursuing their studies at the University. The controversy must be determined by the act itself. By reference to the summary of its various sections as hereinbefore set out, it will be observed that three-fourths of all the moneys raised by this tax was intended to create "the State University scholarship fund" of the several counties of this State to be kept as a permanent fund to be invested so as to bear interest. This interest is to be collected annually and one-fourth of it added to the fund and the remaining three-fourths to be appropriated for establishing and maintaining free scholarships in the University, the amounts and terms of which are to be fixed by the curators of the University. By section 9 provision is made for competitive written examinations on the first week of August in

each year of actual residents of each county which shall meet the requirements for entrance in the academic department of the University, provided, however, that no applicant shall be eligible to receive such free scholarship unless the examiners "shall be satisfied that the (said) applicant is dependent upon his own exertions for his education and financially unable to otherwise obtain the same."

Having thus determined who may be the beneficiaries of this tax and segregated them from the great mass of citizenship, and awarded them these free scholarships, Section 10 of the act provides "they shall be entitled to enter thereon free of matriculation fees any department, school or college of the University, *and have paid to them in equal monthly installments while attending the University the sum provided by the scholarship so awarded for defraying the expenses of such attendance.*"

Deferring for the present any discussion of the proposition that one-fourth of the tax may be sustained because it is directed to be paid into the State treasury for the benefit of the "Seminary Fund," an admitted public use, we direct our attention to the arguments for and against the "free scholarship fund." It is perfectly evident, we think, that no distinction can be maintained between the fund and its annual increment.

It cannot be true that this fund is a state or public fund under this act while the whole beneficial use and interest arising therefrom is private. Such a distinction is illogical and unsound. The fund is created for the sole purpose of producing the interest to be derived from it, and it is incredible to believe that the Legislature would have provided the tax at all if it was not to obtain the interest to be used for the maintenance of the scholars. The fund and the interest are inseparable.

Counsel for the curators urge that this statute can only be properly construed by keeping in view "the historical setting" of the University and "its historical genesis." They assert that university education is a proper, indeed one of the primary, objects for which public taxation may be levied, and that the extent of such taxation in aid of higher education is for the Legislature alone to determine; that the constitution having established the free public school and the university, the Legislature can go further and furnish free support of the children while attending these schools and the University. It is true that the learned counsel for the curators are not altogether in harmony on this proposition. Some of the learned

counsel for the curators boldly argue that, if the Legislature can furnish free scholars and free teachers, why can it not go further and furnish a free support to the children who attend these schools, if that is deemed necessary to make the system a success, whereas their colleague draws the line at the free support of the students of the University and denies the right to furnish free living to the children attending the common schools, "because the law recognizes and enforces the parental obligation of support during the period of elementary education." Some of the learned counsel for the curators admit that such a support of the students is paternalism in its most pronounced form, but say it is "*not of a hurtful or dangerous kind; that it is only paternalism of the State, not of the Federal government.*"

Paternalism, whether State or Federal, as the derivation of the term implies, is an assumption by the government of a quasi-fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people, upon the theory that the people are incapable of managing their own affairs, and is pernicious in its tendencies. In a word, it minimizes the citizen and maximizes the government.

Our Federal and State governments are founded upon a principle wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent States were capable of self-government—a system in which the people are the sovereigns and the government their creature to carry out their commands. Such a government is founded on the willingness and the right of the people to take care of their own affairs, and an indisposition on their part to look to the government for everything.

The citizen is the unit. It is his province to support the government, and not the government to support him. Under self-government we have advanced in all the elements of a great people more rapidly than any nation that has ever existed upon the earth, and there is greater need now than ever before in our history of adhering to it.

Paternalism is a plant that should receive no nourishment upon the soil of Missouri. While the exigencies of this case may require the operation of such a principle, we are sure its germ is not to be found in the constitution of this State, nor in the spirit of its people. Whatever other fault the constitution of 1875 may have, it is certain that its framers sought most sedulously to curb the power of those

clothed with authority to legislate in behalf of favored classes, and to leave the people the largest possible control over their own affairs. Especially has the power of taxation been jealously hedged about and limited. The same authority is found in the constitution to levy taxes to clothe and feed the children who may desire to attend the free public schools as there is to raise money by taxation to hand over to young men and young women to support them while they acquire what is termed "the higher or university education," *but we find no warrant for either in the organic law of this State, or in the character of our government.*

It is one thing to provide for the establishment and maintenance of a State University, and a system of free public schools, the State through its own officers, agencies and municipalities constructing and owning the buildings and apparatus and employing the teachers as public functionaries responsible under her own laws for the discharge of their duties, and a wholly different thing to support private individuals who attend the University and public schools by public taxation.

But it is said that nothing is more common than the endowment of free scholarships as a part of the endowment of a university. This may be true of the universities of Europe, and individual instances are to be found in this country, where some great benefactor of the race has out of his own bounty provided such scholarships, but these examples furnish no guide to the free States of this Union, clearly not to the Legislature of Missouri under its organic law.

The act under consideration endows the scholar, not the University. It provides in unmistakable terms that a fund shall be raised by taxation and paid over to students attending the University for *their support* while so engaged.

It is a pure and simple gift of public money by the State to private individuals for their own private use, in plain violation of Section 46, Art. 4 of the constitution, which prohibits the Legislature from granting public money "to any individual, association of individuals, or other corporation whatsoever." We hold that when the constitution provided for the establishment and maintenance of the University, it conferred authority to support an institution belonging to the State, and this grant is not to be extended to the *unlimited support* of the *pupils* who may attend or desire to attend that school. In obedience to the mandate of the constitution, the Legislature has made generous provision for the University and public schools, and the opportunities for education are commensurate

with the greatness of the commonwealth and the needs of the people. Neither the constitution nor a sound public policy demands that the State should indirectly stifle all motive for individual effort and laudable ambition. Free common schools adorn every school district in the State. Splendid normal schools are distributed to its different sections, and the doors of the University are practically opened to every thrifty, energetic young man and woman in the State. The State has not been niggardly with its children; every proper stimulus is set before them. But here she stops and says to the citizen, the right to lay further burdens for your private benefit is exhausted. Under equal and just laws, by your own self-reliance and energy, you must win the rewards of labor, and the honors of the State.

It is only necessary to add that counsel for the curators do not attempt to maintain this tax on the theory that the young men and women who would obtain these scholarships are paupers in the meaning of the law.

Even without this admission it is perfectly apparent that the act by its terms does not confine this pension to the children of poor persons who may in a legal sense be denominated paupers.

The class of ambitious young men and women who could avail themselves of the benefits of this act would resent such a designation and scorn this proffered aid if to obtain it they must first be classed as paupers. It is perfectly clear that the tax is not levied upon any such principle.

If it were it would collide with another fundamental principle. It would be class legislation. Says Judge COOLEY in his work on taxation, page 221 :

"To justify taxation for the purpose of education the rules under which the people shall be admitted to the privileges given must not be invidious and partial, but must place all parties upon a plane of practical equality. The rule is substantially the same here that applies in the apportionment of taxation; equality must be the aim of the law, and it must be assumed that the State has no special favors to bestow upon privileged classes. It will not be competent to single out some one class of the community and exclude them from the benefits of the public schools on arbitrary grounds."

Our conclusion is that this tax is levied for a purely private purpose, and, for that reason, it is in contravention of the constitution of Missouri.

This tax is assailed in another vital point. Relators assert it is

void for want of uniformity. John C. Conley, one of the testators, died on the 6th day of December, 1896. His will was probated February 18, 1896. Susan E. Spears, the other testator, died June 10, 1896. It is essential that we determine whether the Act of 1895 or that of 1897 governs. Is the tax to be levied under the Act of 1895, if valid, or the Act of 1897, which was enacted long after the death of both of these testators?

There is nothing in the Act of 1897 which gives it a retrospective operation, and if there was, it would be in direct conflict with the Constitution of Missouri which prohibits retrospective legislation.

We think it must be plain that the Act of 1895, adopted prior to the death of these testators, if valid, must control and not the Act of 1897, enacted after their deaths. This, we take it, is the usual construction. By the terms of each, the devolution of the property and the right of the State to tax accrues immediately upon the death of the testators *In re Seaman's Estate*, 41 N. E. Rep. 401; *In re Embury*, 45 N. Y. S., 821; *Re Estate Roosevelt*, 25 L. R. A., 695; Const. of Mo., Art. 2, Sec. 15; *Lecte vs. Bank*, 42 S. W. Rep., 1074.

Looking to the Act of April 1st, 1895 (Laws of Mo., 1895, p. 278), for authority for this tax, we are met with the objection that this tax is also void, because the said act is in violation of Section 3 of Article 10 of the constitution of Missouri, and of the 14th Amendment of the United States, and Section 4 of Article 10 of the constitution of Missouri.

Of these in their inverse order. As already remarked, no doubt longer exists that it is competent for the Legislature to levy a tax upon the succession of estates. It is quite universally held that such a tax is not a tax upon property in the ordinary sense, but is in the nature of an excise, or bonus, exacted by the State upon the privilege or right to inherit or succeed to an estate.

It is not necessary at this time to enter upon an examination of the extent of this right on the part of the State, nor to approve or disapprove the extreme views expressed by some of the courts. While conceding the right to tax, our duty now is to ascertain, if we can, what was the purpose of the Legislature in enacting this law.

A primary and safe rule of interpretation of a statute is to endeavor to gather the legislative intent from the words they used. *Gardner v. Collins*, 2 Peters U. S., 93; *Brewer v. Blougher*, 14 Pet. 178. The General Assembly has declared that it intended to levy "a collateral succession tax," and we all agree that by whatever

name this exaction may be called, it is referable to the *taxing* power of the State.

The controlling question is, upon what did it authorize that tax to be levied, upon the property or estate of the deceased person, or upon the right or privilege of his beneficiaries to receive his estate by inheritance or devise?

If upon the latter, it is settled by the great weight of authority that it does not fall within the regular ordinary taxation upon property which our constitution requires shall be in proportion to its value. Recurring, then, to the language of the act we find that the ordinary machinery, so to speak, was not prepared for enforcing the Act of 1895, as for enforcing other delinquent taxes. It ordained that a tax of five dollars for each and every hundred dollars of the clear market value of such property where the money or property exceeds ten thousand dollars or less in value, and where the money or property affected exceeds ten thousand dollars in value, the same shall be subject to a tax of five dollars for each and every one hundred dollars of the clear market value thereof up to and including ten thousand dollars in value and a tax of seven and one-half dollars in addition for every such one hundred dollars in value in excess of ten thousand dollars, and gave a *first lien upon the property affected*, but provided no method of valuation.

The mode of procedure was amended in 1897 by providing a means of ascertaining the value of such estates which had been overlooked in the Act of 1895, and a new section to be known as section 1a, which provides that it shall be the duty of the Judge of the Probate Court in this State, whenever the inventory and appraisal of *any estate is filed*, which is subject to the payment of a collateral succession tax, to immediately levy upon and charge *such estate with the amount of such* collateral succession tax, and require the executor, administrator or beneficiary to pay the same, &c.

A "succession tax" as the words indicate, and the history of such taxes clearly establishes, is an excise or duty upon the right of a person or corporation to receive property by devise or inheritance from another under the regulation of the State. Wherever properly laid this is its distinguishing feature in contradistinction from a property tax. The language of these two Acts of 1895 and 1897 is very much involved, and more or less doubt must be felt in interpreting the meaning of the Legislature, and this is true of other acts in other States.

When it is clear that the tax is upon the succession, it is com-

puted, not on the aggregate valuation of the whole estate of the decedent considered as the unit for taxation, but on the value of the separate interests into which it is divided by the will or by the statute laws of the State and is a charge against each share or interest according to its value and against the person entitled thereto. That is to say, it is a burden on each person claiming succession measured by the value of his interests and collectible out of his interest only. Accordingly, in New York, after whose statute the act in question seems to have been in several respects patterned, great difficulty was experienced in construing the law, but having sustained the act as levying a succession tax it was ruled in the matter of Hoffman's Estate, that when the will created contingent estates the executors could not pay the tax until the expectancies became fixed and actual; in other words, being a tax upon the person receiving the share of the estate, it did not accrue until that person was finally ascertained and that the State could only get its taxes when the legatees or devisees obtained their property. Hoffman's Est., 143 N. Y., 327.

And in the Matter of Roosevelt, 143 N. Y., 120, in answer to the contention of counsel for the State, that, while it might be considered a hardship to compel annuitants to pay a tax upon an interest that they might never receive, it was the fault of the statute, and the tax could only be postponed by giving bond, the Court of Appeals answered: "This contention admits away the entire case of the State. It is not to be assumed that the Legislature intended to compel the citizen to pay a tax upon an interest he may never receive." Until the vesting of the estate, "the power to tax does not exist."

It is obvious that the tax is upon the transfer by will or devolution by inheritance, and, in the absence of a transfer and a transferee, there is no basis for a succession tax in its true sense, as it comes to us in the history of jurisprudence and of nations.

With these essential characteristics in view, can the Acts of 1895 and 1897 be said to have levied a *succession tax*?

Section 1a requires the tax to be levied upon the appraised value of the whole estate left by the deceased. The tax is at once levied upon that estate, and the personal representatives of the deceased, not the devisees and legatees, are required to pay the tax. How such a tax differs from general taxes upon the property of the deceased under our system we are not able to state. The mere calling of such a tax a succession tax does not make it different from an ordi-

nary tax upon property when the effect and operation are identical with an ordinary property tax.

This tax is collectible out of all property devised by will or descending to any person other than the father, mother, husband, wife or direct lineal descendent, whether the estate of the ancestor, deviser or grantor is solvent or insolvent. If insolvent, there is nothing to which the heir or devisee or legatee can succeed, and yet upon the theory of a succession an onerous tax is added to the charges against an estate and payable in advance of other claims.

The language of the Supreme Court of Wisconsin in *State ex rel. v. Mann*, 45 N. W. Rep., 526, seems exceedingly appropriate upon this point: "A succession tax would necessarily be imposed upon the respective parties thus succeeding to such residue. But the tax in question is not upon such succession, *but upon the whole estate* at its appraised valuation, regardless of whether it is solvent or insolvent. In case of an insolvent estate nothing would be left after the payment of debts for transmission, and in most estates there is likely to be sufficient debts to reduce the amount of transmission far below the amount of such valuation. Besides, the amount of such tax is graduated by the amount of such appraisal and is to be paid by the executors or administrators before or at the time of filing such appraisal, notwithstanding they may only be interested as such officials and never succeed to any of such estate. Manifestly the burden imposed is not a succession tax, but a tax upon the whole estate regardless of whether it is solvent or insolvent."

The New York Act (Laws 1896, Ch. 908, Sect. 225), provides for a refunding of a proportionate part of the tax in case debts are allowed after its payment and it was owing largely to this provision that that act was sustained, but no such provision is found in our Acts of 1895 and 1897. *In re Westurn's Est.*, 46 N. E., 315.

We think the language of this act, whatever conjecture we may indulge as to the intention of its author, imposes a tax directly upon the property of the decedent and not upon those who may succeed to his estate, and it must be conceded that if it is a property tax it is unconstitutional because it subjects this estate to an additional property tax to that levied upon all other like property in the State for the same year, and is not levied in proportion to its value. But in no event can the Act of 1895, which governs these two cases, be upheld, because the tax authorized by it is not uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Section 3, Art. 10, Const. of Mo.

The class of subjects to be taxed under this act is the succession or inheritance of property by collateral kindred or devisees other than those named in the statute as exempt from its imposition. It is not necessary to determine what would or would not be proper classification under this act in all cases, but it is perfectly clear that when the tax is levied upon the property as under this act, uniformity is only attainable by levying the same per cent. upon all property belonging to persons bearing the same relation to the decedent. A law which levies five per cent. upon one cousin or uncle whose legacy is \$10,000, and five per cent. upon the first \$10,000 of a legacy of \$20,000, bequeathed to another cousin of the same degree, and twelve and one-half per cent. upon the remaining \$10,000 thereof, violates the constitutional principle of uniformity. It is an arbitrary classification without rhyme or reason. Such was the decision of the Supreme Court of Ohio in *State ex rel. Schwartz v. Ferris*, 53 Ohio St., 314; 30 L. R. A., 218, upon a provision of the constitution of that State substantially like Section 3, Article 10, of the Constitution of Missouri.

It is a significant fact that in New York, Maine, Maryland, Virginia, Pennsylvania and Massachusetts, in which inheritance taxes are sustained, the statutes only authorize a uniform rate of taxation. The constitutional guarantee of uniformity upon the same class of subjects would avail but little if the Legislature can arbitrarily vary the classes as often as the amount of property devised or transmitted by inheritance shall differ. If such a rule obtain, the classes will be innumerable, and the constitution a dead letter. Where the amount of property received is made the basis of the tax, uniformity can only be attained by levying the same per cent. upon the property of each beneficiary under the will or by inheritance.

While the legislature might perhaps distribute the collaterals according to the different degrees of kinship to the decedent or testator or grantor, and levy a different rate upon the different degrees, yet when it ignores all such natural classification and makes the amount of money received by each the test of classification it runs counter to another principle that is well nigh universally accepted that a uniform rate of taxation upon every man's property secures equality of burden. To levy a different rate simply because the amount of each man's holdings is different would produce favoritism and destroy that principle of equality before the law which is the boast of free government. If it be urged that the one receiving

the larger bounty enjoys a greater privilege, still the principle of uniformity answers that the value of his right to receive is in direct proportion to the value of the property to which he succeeds, and must, if taxation is to be uniform, be taxed in that proportion or according to one common rate.

In *State v. Hamlin*, 25 L. R. A., 632, the Supreme Court of Maine, in upholding a tax consisting of a uniform per cent., said: "The Constitutional requirement of uniformity is satisfied by a tax on the transmission of property by will or descent to strangers and collaterals *when it is uniform as to the entire class affected*, although other classes of persons are exempted from the tax." See also, *R. R. Tax Cases*, 13 Fed. Rep., 722.

SHERWOOD, BURGESS, ROBINSON and BRACE, JJ., concur; WILLIAMS and MARSHALL, JJ., having been of counsel, take no part in the decision of the case.

JAS. B. GANTT,
C. J.

No. 425 and 463

United Supreme Court U. S.

FILED

JAN 25 1897

Brief of Akin, Shepard, & Iles
IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

Josephine C. Drake, et al., Executors,

Filed Jan 25, 1897.
vs.
1898.

Daniel H. Kochersperger, County Treasurer and ex-officio County Collector, Cook County, Illinois,

Defendant in Error.

Elizabeth Emerson Sawyer, et al., Executors, etc.,

Plaintiffs in Error,

vs.

The Same,

Defendant in Error.

Jessie Norton Torrence Nagoun,

Appellant,

vs.

Illinois Trust and Savings Bank, Executor, etc., of Joseph T. Torrence, deceased, and Daniel H. Kochersperger, County Treasurer, etc.,

Appellees.

Error to the Supreme Court of the State of Illinois

No. 463.

Error to the Circuit Court of the United States for the Northern District of Illinois.

No. 464.

Appeal from the Circuit Court of the United States for Northern District of Illinois

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR
AND APPELLEE.

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ELLED THROUGH

POOR COPY

IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

Josephine C. Drake, et al., Executors, etc., <i>Plaintiffs in Error,</i> vs.	} No. 425. Error to the Supreme Court of the State of Illinois.
Daniel H. Kochersperger, County Treas- urer and ex-officio County Collector, Cook County, Illinois, <i>Defendant in Error.</i>	
Elizabeth Emerson Sawyer, et al., Execu- tors, etc., <i>Plaintiffs in Error,</i> vs.	} No. 463. Error to the Circuit Court of the United States for the North- ern District of Illi- nois.
The Same, <i>Defendant in Error.</i>	
Jessie Norton Torrence Magoun, <i>Appellant,</i> vs.	} No. 464. Appeal from the Cir- cuit Court of the United States for Northern District of Illinois.
Illinois Trust and Savings Bank, Execu- tor, etc., of Joseph T. Torrence, de- ceased, and Daniel H. Kochersperger, County Treasurer, etc., <i>Appellees.</i>	

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR
AND APPELLEE.

I.

STATEMENT OF ISSUES.

The sole question at issue in the above entitled cases at bar is the question of the constitutionality, under the Con-

stitution of the United States, of an act of the General Assembly of the State of Illinois, providing for and authorizing an excise duty, denominated an inheritance tax, upon the right to receive and the transmission of property by will or the intestate laws of the state, approved June 15, 1895, in force July 1, 1895.

And further, the only portions of said statute involved in this controversy are Secs. 1 and 2 of said act—the remainder of said act being predicated upon the validity of Sec. 1, and merely providing the method and means of enforcing the collection of said excise duty.

The case of *Josephine C. Drake, et al. v. Daniel H. Kochersperger, County Treasurer and ex-officio County Collector of Cook County, Illinois*, is an action brought upon petition to the County Court of Cook County to appoint an appraiser under the provisions of said act, and was heard in the Supreme Court of the State of Illinois, upon appeal from the County Court.

The Supreme Court of the state held the act constitutional and remanded the case, with directions to the County Court to appoint an appraiser, and the case comes to this Supreme Court upon writ of error to the Supreme Court of Illinois.

The case of *Elizabeth Emerson Sawyer, et al. v. Daniel H. Kochersperger, County Treasurer and ex-officio County Collector of Cook County*, is an action brought in the County Court of Cook County, Illinois, to enforce payment of the duty assessed against the several legatees and devisees under the will of Charles W. Sawyer, deceased, which case was removed to the United States Circuit Court, for the Northern district of Illinois, upon petition of the defendants, and heard therein upon petition and

answer, in which answer the defendants admit all the material allegations of the petition but deny the constitutionality of the act in question, and rely solely upon the question of the constitutionality of the act under the Constitution of the United States,

The court decided the issues in favor of the petitioner, Daniel H. Kochersperger, county treasurer, and entered judgment against the defendants and in favor of the petitioner, as such county treasurer and ex-officio county collector of Cook County, in the sum of \$6,970., to be paid by said executors and trustees in due course of administration for the account of the various defendants interested in said estate; and the case comes to this Supreme Court upon writ of error to said Circuit Court of the United States.

The case of *Jessie Norton Torrence Magoun v. The Illinois Trust & Savings Bank*, as executor, and *Daniel H. Kochersperger*, is a suit in equity brought in the Circuit Court of the United States, for the Northern district of Illinois, by the complainant to enjoin the defendant, The Illinois Trust and Savings Bank, as executor of the will of Joseph T. Torrence, deceased, from paying, and the defendant, Daniel H. Kochersperger, county treasurer and ex-officio county collector of Cook County, from collecting or receiving the inheritance tax alleged to be due and collectable from the complainant as devisee or legatee under the will of said Joseph T. Torrence, deceased.

In said bill the complainant relies solely upon the question raised as to the constitutionality of the said statute of the State of Illinois under the Constitution of the United States, and admits that said inheritance tax or

duty is due the State of Illinois from the complainant as such legatee or devisee, if said statute is constitutional under the Constitution of the United States.

The court heard the same upon bill and answer, decided the issues against the complainant and dismissed the bill for want of equity, and the case comes to this Supreme Court upon appeal from the said Circuit Court of the United States.

The assignment of errors in all three cases at bar are in substance identical and present but one issue, *i. e.*, the question of the constitutionality, under the Constitution of the United States, of said statute of Illinois, providing for an excise duty and denominated an inheritance tax.

The plaintiffs in error and appellant concede the power of the State to impose an inheritance tax and to grant reasonable exemptions, and confine their challenge to the constitutionality of the act to the mere question of the right of the state to provide by law for a graduated or progressive inheritance tax or duty upon the right to succeed to the property of a decedent, and to omit from the operation of such law amounts as large as specified in said act. (Plaintiffs' and appellant's brief, 7-8.)

II.

ANALYSIS AND CONSTRUCTION OF THE ILLINOIS LAW IN QUESTION.

The distinctive features of the duty imposed by the act in question are that bequests and inheritances are classified with reference to the relationship of the beneficiary to the decedent, and the amount of the bequest or inheritance devolved.

The classes formed are six in number, as follows :

Class 1. Where the beneficial interest passes to or for the use of a father, mother, husband, wife, child, brother, sister, wife, or widow of a son, or husband of a daughter, or any child or children adopted, or any lineal descendant born in lawful wedlock, the duty is fixed at \$1. on every \$100. of the clear market value of such property received by each person in excess of \$20,000.

Class 2. Where the beneficial interest passes to or for the use of an uncle, aunt, niece, nephew, or any lineal descendant of the same, the duty is to be fixed at \$2. on every \$100 of the clear market value of such property received by each such person in excess of \$20,000.

Where the beneficial interest passes to or for the use of one who does not sustain any relation to the decedent, as enumerated in the first two classes, the duty is based upon the amount received by each such persons, as follows :

Class 3. Where the amount or estate received is of value of \$10,000. or less, the rate is fixed at \$3. on each \$100.

Class 4. Where the amount or estate received is of value exceeding \$10,000. and not exceeding \$20,000., the rate is fixed at \$4. on each \$100.

Class 5. Where the amount of estate received is of value exceeding \$20,000., and not exceeding \$50,000., the rate is fixed at \$5. on each \$100.

Class 6. Where the amount or estate received is of value exceeding \$50,000. the rate is fixed at \$6. on each \$100.

NOTE. Where the amount of estate received by one not within the relationship enumerated in the first two classes does not exceed \$500. no duty is imposed. No duty is imposed upon life estates or estates for years where such estates pass to or for the use of a father, mother, husband, wife, brother, sister, widow

of a son, or a lineal descendant of the testator, with remainder to a collateral heir or stranger to the blood or a body politic; but for the value received by the remainderman, after the value of the life estate is deducted, the duty is charged at the rate prescribed for the class of beneficiaries to which such remainderman belongs.

The method of computing the rate to be charged in the several classes is immaterial in deciding the issues involved in this case for the classification into six classes is clearly defined by the provisions of the act, and does not depend for its existence upon any ultimate construction that may be placed upon the method required for computing the rate to be charged in either of the classes, to wit:

The classification into six classes remains unchanged whatever method of computation may be used.

It is apparent that the word "estate" as used in the act relates to and indicates the estate or property passing to and received by the heir, legatee or devisee, and not the estate of the deceased; and that in the specification of classes 1, 3, 4, 5 and 6, the word "estate" is equivalent to the words "legacy, devise or inheritance."

By substituting its equivalent for the word "estate" in such classification, all ambiguity disappears, and the intent of the legislature is clear and the provisions in relation to all bequests, not included in the first two classes, read as follows:

"In all other cases the rate shall be as follows:

On each and every hundred dollars of the clear market value of all [such] property and at the same rate for any less amount; on all legacies, devises or inheritances of ten thousand dollars and less [in value], three dollars; on all legacies, devises or inheritances of over ten thousand dollars and not ex-

ceeding twenty thousand dollars [in value], four dollars; on all legacies, devises or inheritances of over twenty thousand dollars and not exceeding fifty thousand dollars [in value], five dollars; on all legacies, devises or inheritances over fifty thousand dollars [in value], six dollars; provided that a legacy, devise or inheritance in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax."

And the provision in relation to the omission of property at a less sum than \$20,000. from the operation of the law, set out in the specification of Class 1 (Lineals), reads as follows:

"Provided that any legacy, devise or inheritance which may be valued at a less sum than twenty thousand dollars shall not be subject to any such duty or taxes, and the tax is to be levied in above cases only upon the excess of twenty thousand dollars received by each person."

Such construction and substitution are in strict conformity with well established rules of construction held by the courts, and the court not only may but should substitute a word or words, or such equivalent or synonym, when such substitution makes clear the intent of the legislature, as expressed by the purpose and the language of the act.

Perry County v. Jefferson County, 94 Ill., 214, 220;

Walker v. City of Springfield, 94 Ill., 364, 371;

The People ex rel v. Hoffman, 97 Ill., 234, 237.

The intent of the legislature to levy the duty or tax upon the legacy or inheritance passing from a decedent to the heir, legatee or devisee, and not upon the estate of

the decedent, is manifest from the language of the act as expressed by the charging part of Sec. 1, and also from the title of the act. The object of the legislature is often avowed in the title of the act, as well as in the preamble. (94 Ill., 214-223; Potter's Dwarrris Stat., 103.)

It is entitled, "An Act to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same."

The charging part of Section 1 provides as follows:

"All property, real, personal and mixed, which shall pass by will or the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift, made in contemplation of the death

* * * to any person or persons, or body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be, and is subject to a tax at the rate hereinafter specified."

Stripped of its verbiage, the express provision is that property in the state passing from a decedent to an heir or legatee by will or the intestate laws of the state, or by gift in contemplation of death, shall be subject to a tax, at a rate to be specified in said act.

Again, in section 4 of the act, the tax is made a lien upon specific legacies, and the administrator or executor is forbidden to pay any specific legacy until the tax on such legacy is paid, and if such legacy is money he is required to deduct the tax and pay over the balance, and

if a legacy is a charge upon any real estate, the heir or devisee entitled to the real estate is required to pay the tax upon such legacy and is authorized to deduct the amount so paid from the legacy in his settlement with the legatee, and until such tax is paid it is a lien upon such real estate.

The above expressed provisions are inconsistent with any other theory, except that the duty or tax is rated and charged against the several legacies and inheritances *upon the basis of the value of the estate passing to the legatee or heir*, and not, in any instance, upon the basis of the value of the entire estate of which the deceased died seized. And considered together with the fact that the word "estate" is a word of many meanings and applies as well to the property passing to the legatee or heir as to the property of which the deceased was seized at the time of his death, removes all doubt and determines the sense in which the word "estate" is used in this act.

Statutes should be interpreted according to the intent and meaning, and not always according to the letter.

Potter's Dwarris on Statutes, 144, 175.

Where we manifestly see what is the sense that agrees with the intent, it is not permissible to turn the words to a contrary meaning.

Vattel Book II, Chap. 17, Sec. 274, page 220.

The construction, advanced by counsel for plaintiffs in error and appellant, that two systems of classifications are used, one based upon the amount received by each person, and the other based upon the value of the whole estate owned by the decedent, is manifestly erroneous in

that it violates the above well settled rules of construction and leads to an absurd conclusion.

The absurdity consists in this: that to introduce the two systems of classification contended for by counsel would also introduce two methods of computation in all estates which include legacies or inheritances passing to persons of the first or second class and also to persons not of those classes; one method based upon the amount received by each person and the other based upon the amount of the entire estate left by the decedent.

This conflict of method of computation, in view of the fact that by the terms of the act the duty or tax assessed is chargeable only against the respective shares passing to the several beneficiaries, would make it impossible to collect all the duty required to be assessed on account of legacies or inheritances passing to persons not of the first or second class, except in a limited number of cases, *i. e.*, only in cases where the sum of such legacies or inheritance equal or exceed the amount of tax imposed by reason of the same.

Illustration :

Suppose A died seized of property valued at \$1,000,000., and by will devised \$750,000. to his children, \$200,000. to nephews and nieces, and \$50,000. to strangers to the blood.

Then the duty assessed upon the estate in behalf of the bequests to strangers to the blood would be \$6. on each \$100. of the aggregate estate of \$1,000,000., which amounts to \$60,000., whereas, the legacies bequeathed are only \$50,000., and as there is no provision in the act for the entire estate contributing toward the payment of such duty and no provision for its distribution among other

beneficiaries, it follows that a duty of \$10,000. in excess of all the funds available for its payment, would be levied, and that such excess would be uncollectible.

It is therefore evident that the legislature did not intend the word "estate," as used in the specification of classes in the act, to relate to the estate of which the deceased died seized, but intended that it should be interpreted, in conformity with the rest of the act, to relate to the estate passing from the decedent to the beneficiary, in every instance where the word is used with reference to classification; for it will not be presumed that the legislature intended to enact an absurdity.

The construction which we contend for is the one given in other states to similar language in statutes of this nature.

In the matter of Howe, 112 N. Y., 100, the act passed declared that all property which should pass by will to any person, etc., other than the father or certain other excepted persons:

"shall be subject to a tax of \$5. of every \$100. of the clear market value of such property, provided that an estate which may be valued at a less sum than \$500. shall not be subject to such tax or duty."

It was contended that the word "estate" meant the whole body of the estate, but the court said:

"We think that applies to the portion of the property passing to the legatee or devisee, and not to the whole estate left by the testatrix. The tax is not imposed upon the estate of which she was seized or possessed, but only upon so much of it as passes to certain persons, not all persons or any person; and, although the executor is required to pay the tax, he is to deduct it from the particular legacy. * * * There are many other provisions of the act requiring the same construction, all tending to show that in

the matter of taxation, it is simply the estate or share of the beneficiary acquired through the will or the statute of distributions, which is to be valued, and the duty estimated according to its value."

The matter of Hoffman, 143 N. Y., 327, to the same effect.

In California, the statute provided that all property which should pass by will or by the intestate laws of the state from any person who may die to persons other than to the father, mother, husband, etc., shall be subject to a tax of \$5. on every \$100. of the market value of such property

"provided that an estate which may be valued at a less sum than \$500. shall not be subject to such duty or tax."

In re Wilmerding, 117 Cal., 281, among other objections to the constitutionality of the law, it was contended that the act was invalid:

"For the reason that it exempts from the tax estates which may be valued at a less sum than \$500. ";

but the court said :

"The estates which are thus exempt are not the estates of the decedents which are less than \$500. in value, but the estates taken by an inheritance or devise, which, under the provisions of the act, are valued at less than that sum."

Counsel endeavor to defend their construction by quoting from the opinion of the Supreme Court of the State of Illinois in the Drake case, but in this they are equally erroneous in their reasoning. The language quoted is as follows :

"By this act of the legislature six classes of property are created heretofore absolutely unknown. It is those classes of property depending upon the estate

owned by one dying possessed thereof of which the state may regulate as to its descent and the right to devise. * * * No person inherits property or can take by devise except by the statute; and the state, having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown."

The interpretation placed by counsel in their argument upon the above quoted language used by the court, is a misapplication of the court's meaning and a perversion of the language.

The clause, "It is those classes of property depending upon the estate owned by one dying possessed thereof of which the state may regulate as to its descent and the right to devise," does not relate to the *method* of classification used, but relates solely to *power* of the state to classify such property and to levy a tax upon the several classes.

The clear meaning of the language quoted is, that the legislature has created six classes of property *out of property over which the legislature has control for that purpose*, and that the property out of which such classes are created, is property *subject to devolution by the statute of wills and the intestate laws of the state*, and it cannot be construed as limiting the system or method of classification used in said act. The language is the statement of a *general principle*, and not the specification of a rule of action to govern the method or extent of a special classification.

The Supreme Court of Illinois, so far from holding in the Drake case that the tax is based in any instance upon the estate of which the deceased died seized, holds clearly to the contrary in the following express terms:

"The tax assessed on classes thus created is absolutely uniform on the classes upon which it operates,

and, under the provisions of the statute, is to be determined by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property inherited."

And in stating the classification provided in the law, the court says :

"That statute [The Inheritance Tax Law] provides that certain classes of property which were a part of an estate shall be exempt from taxation under these provisions, and when the legislature provides other classes of property some of which shall pay \$1. per \$100. and others \$2., others \$3., and others \$4., and still others \$5., and again others \$6. per \$100., six different classes are created under and by which a tax is levied by valuation on the right of succession to a separate class of property. The class on which a tax is thus levied is general, uniform, and pertains to all species of property included within that class."

The illustrations given by counsel (page 10, appellants' brief) are inconsistent with each other ; and, with one exception, are at variance with their theory advanced on page 9, "that the tax applying to all legatees or devisees other than near relatives depends upon the amount of the estate left by the decedent irrespective of the amount received."

Hence the illustrations prove nothing except that counsel have forgotten or ignored their major premise.

The second objection of counsel based upon the illustration given (p. 11, appellants' brief) in which it is shown that, if the duty be levied in the several classes of non-relations upon the basis of the amount received by each person, a legatee receiving by will \$10,000., would be the recipient of more money after the tax was paid than one who is bequeathed \$10,001., is equally untenable in the eye of the law, for the condition assumed is so extremely

improbable as to be presumed to be practically impossible, and for the additional reason that in any event, and in every instance, the rate required to be paid in the several classes is uniform within such classes, and each legatee or devisee pays at the same rate and amount for the same benefit received, and all persons under the same conditions, or placed in the same circumstances, are entitled to the same privileges and charged with the same obligations.

Moreover, it is to be observed that the questions in issue here are the power of the legislature to classify and the constitutionality of the classification under the Federal Constitution, and not the construction of the statute as to the method of computation to be used in finding the amount due in a particular estate.

The question of construction as to the method of computation to be employed in finding the amount to be charged against a particular legacy is quite a different proposition from the question of the power to classify and the validity of the classification when made.

It is a well settled rule of construction that where two constructions may be given to a provision of a statute, one reasonable and consistent with the spirit of the law, and the other unreasonable, inconsistent or absurd, the reasonable and consistent construction should be given, unless the language of the statute forbids such construction.

Potter's Dwarries on Stat., 144 ;

United States v. Kirby, 7 Wall., 486 ;

Oates v. First Natl. Bank, 100 U. S. Rep.

(10 Otto) 239.

We, therefore, submit that said act, when construed by the well established rules of the construction applicable thereto, is logical in its classification, and uniform in its application to all persons similarly situated, who come within the scope of its provisions, as follows :

1. Six separate and distinct classes of inheritances, legacies or mortuary gifts are created, based upon the relationship of the heir, legatee or devisee to the deceased, and the amount of such inheritance, legacy or mortuary gift devolved.
2. The duty charged is charged upon the legacy, inheritance or mortuary gift passing from a decedent and not upon the estate of the decedent.
3. The rate of duty charged is based upon the amount received by the heir, legatee or devisee with reference to his relationship to the deceased, and is a duty or tax upon his right of succession.
4. The rate charged is uniform within each class, and all persons under the same circumstances or placed in the same condition, are entitled to the same privileges, and are charged with the same liabilities.

We see, therefore, that appellants in order to sustain their contention that this law operates unequally upon persons under like circumstances and conditions are driven to a construction of the law which is strained, unnatural and absurd. It may be, however, that counsel do not mean all that their language implies, and that what they desire to be understood as saying is, that the rate shall be levied on the portion of the estate which passes to strangers, without reference to the amount of such portion passing to each person. In this view, the case presented by the illustration of

appellants might possibly result from the operation of the law. But we submit that even under such a construction, the law should not be held invalid on the ground of inequality. That portion of the law now under discussion relates to the transmission of property to strangers, and it should be borne in mind that such transmission under the laws of Illinois can only be had under and by virtue of some testamentary disposition. Under the intestate laws of Illinois, strangers can under no circumstances take any portion of a decedent's estate. The question now discussed relates, therefore, only to the right of a person to transmit property to strangers, and of such strangers to take property by will.

We will hereafter show that inheritance tax laws have, by the great weight of authority, been held to impose a duty upon privileges, and not a tax on property. But whether such laws impose a duty on the privilege of transmitting or on the privilege of taking is, perhaps, not so clear.

Where property passes under intestate law, no privilege can be said to be granted to or exercised by the decedent. The law in such case distributes the estate, and confers upon certain named persons the right to take the property. Here, the privilege must necessarily be a right to take and the duty, if any, is imposed, is upon that right. Where property passes by will, and the law imposes a duty upon the estate passing to each legatee or devisee, and each legatee and devisee is charged with the payment of the duty, in such cases, the law seems to be leveled at the right to take, and the duty, in such cases, may, we think, be justly said to be a tax upon the right of succession. But where the law gives no heed to the manner of distribution, or to the individual devisees or

legatees, and the personal representatives are charged with the payment of the duty out of estate of the decedent, there, it seems to us, the law is leveled at the right to transmit; it is the decedent who is in the mind of the legislature, and the duty imposed is upon the right of a decedent to transmit his property by will.

If the construction contended for by appellants is the true one, then we submit this law, so far as it relates to strangers, imposes a duty upon the privilege of transmitting property to that class of persons rather than upon the privilege of such persons to succeed to a decedent's estate, and, had the Supreme Court of Illinois adopted appellants' construction in the Drake case, it would have so held.

The distinction, for which we contend, is not without authority to support it.

In the case of *State v. Hamlin*, 86 Me., 495, the Supreme Court of that state says:

"It is argued that the excise, if upon privilege of taking property by will or descent, should be the same whenever the privilege enjoyed is the same in kind and extent, whatever may be the value of the estate, and that the exemptions should relate to the value of the property received by those who have the privilege of receiving it, and not to the value of the estate. But the right or privilege tax can perhaps be regarded either as the right or privilege of the owner of the property to transmit it on his death, by will or descent, to certain persons, or as the right or privilege of these persons to receive the property. The tax, too, has some of the characteristics of a duty on the administration of estates. * * *

If the law in question, so far as it relates to strangers, is held to impose a duty upon the right to transmit property to strangers by last will and testament, then it is

without objection on the ground of non-uniformity or inequality. Under such construction, the law says to all persons, without distinction, discrimination or classification, you may dispose of your property to strangers, by will, upon the following terms and conditions:

If you devise or bequeath property amounting to \$10,000. or less, the duty shall be 3 per cent; exceeding \$10,000. and not exceeding \$20,000., 4 per cent; exceeding \$20,000. and not exceeding \$50,000., 5 per cent; exceeding \$50,000., 6 per cent. If the amount of property so transmitted does not exceed \$500. in value no tax shall be imposed. Such a law confers upon each and every person a like privilege, and imposes upon each and every person a like duty or tax.

But counsel for appellants contend that under this construction it may happen that two persons who are each left a legacy of like amount, but from different estates, may not realize the same amount from their respective legacies. This is true, but such a result is not aimed at or contemplated by the law. It is an inequality resulting from a possible operation of the law, and this in no wise affects its constitutionality.

In speaking of the validity of laws by reason of inequality of burden resulting from their operation, this court, in the case of *Merchants Bank v. Penn.*, 167 U. S., 467, quoting the language of the lower court, says:

“The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand.”

And this court then adds:

“Indeed, this whole argument of a right under

the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap Railroad v. Pennsylvania*, 134 U. S., 232, 237, in which case Mr. Justice BRADLEY, speaking for the court, said :

'The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products : it may tax real estate and personal property in a different manner ; it may tax visible property only, and not tax securities for payment of money ; it may allow deductions for indebtedness, or not allow them. * * * We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material ; but it would render nugatory those discriminations which the best interests of society require ; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice ; and which every state, in one form or another, deems it expedient to adopt.' See, also, *Jennings v. Coal Ridge Improvement Co.*, 147 U. S., 147."

III.

There is no Natural Right of Inheritance or Succession, and the State has the Absolute Right of Control over the property of Decedents.

Counsel for appellant advance the contention that there is a natural right of succession or inheritance. They insist that :

“The estate of a decedent is to go to some person or persons. To what persons and in what proportions the state may determine and regulate, and that is the extent and limit of its power,”

and they quote a sentence from the opinion of Mr. Justice BROWN in *U. S. v. Perkins*, 163 U. S., 628, as recognizing this natural right. Said sentence is as follows :

“The general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents.”

The sense in which the term “natural right” was used in the above sentence is clearly shown by the opinion from which the sentence is taken. We shall have occasion to quote said opinion in another connection. Natural rights are such only as pertain to man in his natural condition. Speaking of natural rights, BLACK, in his Constitutional Law, page 386, says :

“It was formerly the custom to use this term as designating certain rights which were supposed to belong to man by the ‘law of nature,’ or ‘in a state of nature.’ But clearer modern thought has shown that the ‘state of nature’ assumed by the older writers is historically unverifiable and inadequate to account for the origin of

rights. * * * The law of physical nature recognizes no equality of rights, its rule is the survival of the fittest. In a state of nature, such as was once supposed, there could be no right but might, no liberty but the superiority of force, and cunning. * * * But since organized society is the natural state of man, and not an accident, it follows that natural rights must be taken under the protection of law, and although they owe to the law neither their existence nor their sacredness, yet they are effective only when recognized and sanctioned by law."

The right to inherit property cannot be regarded as a natural right. It doesn't exist at all except as it is created by positive law, and it is always subject to change by the same law.

COOLEY in his *Constitutional Limitations*, p. 439, speaking of rights protected by the law of the land, says :

"And it is because a mere expectation of property in the future is not considered a vested right, that the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner. No one is heir to the living, *and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the statute of descents.* But this promise is no more than a declaration of the legislature as to its present view of public policy as regards the proper order of succession—a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. The expectation is not property; it cannot be sold or mortgaged; it is not subject to debts, and it is not in any manner taken notice of by the law until the moment of the ancestor's death, when the statute of descents comes in, and for reasons of general public policy transfers the estate to persons occupying particular relations to the de-

ceased in preference to all others. *It is not until that moment that there is any vested right in the person who becomes heir, to be protected by the constitution*"

In *Norman v. Heist*, 5 W. & S., 171, the question arose upon an act passed by the legislature to vest in certain grandchildren property that had before the passage of the act vested in the brothers of the intestate. Chief Justice GIBSON, in indignantly denouncing the act, says:

"This estate was lawfully vested in the plaintiffs, who were the next heirs to their intestate sister, at her death * * * it was theirs in full property * * * it was guaranteed to them by the constitution and the laws * * * and to have despoiled them of it *in favor of the supposed natural right of the grandchildren*, would have been as much an act of despotic power, as it would had the grandchildren been strangers to the intestate's blood. Take it that they had the same claim, on the score of birthright, which their father might be supposed to have had; yet still, as *title is the creature of civil regulation, even a legitimate child has no natural right of succession to the property of its parent.*"

Blackstone's definition of an heir is:

"An heir, therefore, is he upon whom the law casts the estate immediately upon the death of the ancestor;"

and he says:

"We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi merely.*"

2 Blackstone's Com., 211.

In *Lavery v. Egan*, 143 Mass., 392, it is said:

"It is the law, whether customary or statutory, which determines who shall inherit real property when the owner dies intestate, and the law alone decides whether the word 'heirs' shall include rela-

tives or connections by affinity as well as relatives by consanguinity. An heir, therefore, is he upon whom the law casts an estate of inheritance immediately on the death of the owner."

An expectation or probability that the property of a parent will descend to the child, however well founded such expectation may be in the laws of natural affection, is not a right and is not within the protection of the law in the sense that the legislature cannot, by an enactment, entirely obliterate such expectation. The right to life is a natural right, and a vested right; so the right to liberty; so the right to property where the title is vested. It is only vested rights that are protected by the constitution from destruction by the legislature.

In *State Bank of Ohio v. Knoop*, 16 Howard, on page 408, Mr. Justice CAMPBELL makes this clear statement:

"The whole society is under the dominion of law, and acts which seem independent of its authority, rest upon its toleration. The multifarious interests of a civilized state must be continually subject to the legislative control. General regulations, affecting the public order, or extending to the administrative arrangement of the state, must overrule individual hopes and calculations, though they may have originated in its legislation. It is only when rights have vested under laws that the citizen can claim a protection to them as property. Rights do not vest until all the conditions of the law have been fulfilled with exactitude during its continuance, or a direct engagement has been made, limiting legislative power over and producing an obligation."

In *Brettun v. Fox*, 100 Mass. 234, the court said:

"The objection of the respondent that the statute could not constitutionally limit the owner's power of testamentary disposition is equally novel and unfounded. The power to dispose of property by will is neither a natural nor a constitutional right, but

depends wholly upon statute, and may be conferred, taken away, or limited and regulated, in whole or in part, by the legislature."

And in *Mager v. Grima*, 8 Howard, 490, this court said of the Statute of Louisiana :

"Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses of regulating the manner and term upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it."

In *Crane v. Reeder*, 21 Mich., 73, it is said :

"There is no such thing as a natural line of inheritance independent of the law."

And in *State v. Hamlin*, 86 Me., 495 :

"Descent is a creature of statute, and not a natural right."

In *Willis v. Weller*, 10 Ohio, 464, the court states :

"In the United States, it is believed that this power (of devising) will be found only as the result of legislation."

In *Eyre v. Jacob*, 14 Gratt., 422, it is said :

"The right to take property by devise or descent is the creature of the law and secured and protected by its authority. The legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent, to a particular class of his kindred, say to his lineal ascendants. It might impose terms and conditions upon which collateral relations may be permitted to take it, or it may, tomorrow if it pleases, absolutely repeal the statute of wills and that of descents and distributions, and declare that upon the death of a party, his property shall be applied to the payment of his debts and the residue appropriated to public uses."

And in *Sturgis and others v. Ewing*, in the 18th Ill., 176, Mr. Justice CATON said, on page 183:

"And can there be a doubt that the right to devise is a subject entirely within the control of the legislature? The power to devise is not an inherent, natural right, conferred upon us by the law of nature, as is the right to acquire and own. So long as we cannot possess, control or enjoy anything we have, after we are dead, we can have no absolute right to say what shall be done with our acquisitions after that period. As mortals we then cease to be, and all connection with earth and our acquisitions terminate. * * * Depending alone upon the law of nature, our estates would become the property of the first who should seize them as they fall from our hands. The power to control the disposition of our possessions after our demise, is conferred by municipal laws, and is purely a subject of municipal regulation. It is not a part of the right of property itself, but is only an incident to it, as the law for the time being, makes it so. Without this power, our title may be complete and absolute. By devising our property we do not lessen or impair, in the least degree, our title to the property devised. We may change the devise, or alienate it, at pleasure, at any time during our lives; and until our demise, the devisee acquires no sort of right or title to it. When we acquire property, we do not acquire with it, and as a part of it, the right to devise it in any particular mode, or even to devise it at all. The objection urged to this law involves this proposition: that whoever acquires property, acquires with it the right to devise it according to the law as it then exists."

And again, considering the right of heirs to take, he says, on page 185:

"Our statute of descents has provided for the disposition of estates in case of intestacy, and practically performs the office of the will of the deceased. While the legislature gives us the power to dispose of our estates it has provided the law of descents to dispose of them for us, in case we neglect to do so by our wills. This law, as it now stands, provides

that all my children shall share equally in my estate, if I die intestate; and yet my children have no vested right in that provision of law, so as to prevent the legislature from changing the law as that my sons shall take twice as much as my daughters, or that my widow shall take one-half of my estate, or, indeed, make any other disposition of my estate which to them may seem good. While I live, no legal right whatever is vested in my heirs. They have but an expectancy, which may be disappointed by a change in the law at any time, and such change will control the disposition of such portions of the estate which are acquired before the change, as well as that acquired after. * * * A man cannot even have a vested right in his own will, as such, so that the legislature may not so change the law as to make his will, which is now made with all the forms of law, and every disposition in it in strict conformity to the statute, utterly void. * * * A will has no legal effect or power while the testator lives. Till his death it is as nothing. It can deprive him of nothing, and can confer nothing upon another, consequently there can be no vested rights under it which can be violated by any change of the law. * * * Laws regulating the descent of lands are much older than those which confer the capacity to devise them, and yet I am not advised that it has ever been denied that the legislature has power to change the course of descent, and that such change will operate instantly upon all estates which may subsequently descend, no matter when or how the intestate may have acquired the title."

And in *Edwards v. Pope*, 3 Scam. R., 465, it is said:

"The legislature may so change the law of descents as to cut off all our expectations of inheritance and confer it upon a single child, and may deny the power of disposition by will as to prevent the bounty of our parents."

To the same general effect is

Henson v. Moore, et al., 104 Ill., 403.

It was then in perfect accordance with the principle enunciated by all the leading elementary writers and by the long line of decisions of the courts of many of the states, as well as of this court, that the Supreme Court of Illinois, in the case now under consideration, declared, as the premise from which it concluded that the state had a right to impose conditions or burdens on the right of succession to the ownership of property, quoting from the opinion of Chief Justice PHILLIPS, in *Drake v. Kochersperger*, 167 Ill., 125, that :

“The existence of the common law within the State of Illinois results from the provisions of Chapter 28 of the Revised Statutes, which declare that the common law of England, and all statutes of a general nature, made prior to the fourth year of James I, shall be the rule of decision and shall be considered as of full force until repealed by legislative authority. By that authority, Chapter 39 of Revised Statutes, entitled “An Act in regard to the descent of property,” and chapter 148 entitled “An Act in regard to wills” were enacted which in effect repealed the common law in reference to inheritance, and also repealed the statute enacted prior to the fourth year of James I, in reference to devises. There is not in force in this state, under chapter 28 any law providing for the descent or devise of property. The laws of descent and the right to devise and take under a will, within the State of Illinois owe their existence to the statute law of the state. The right to inherit and the right to devise being dependent upon legislative acts, there is nothing in the constitution of this state which prohibits a change of the law with reference to those subjects, at the discretion of the law-making power.”

It is nowhere denied that the right to authorize the disposition of property by a will or testament and to regulate or prohibit it is as much within the control of the state as is the designation of who shall be an heir to in-

testate property. What principle of constitutional law prohibits the state from declaring that the property of a testator shall not pass either by his will or to any person or class of persons by descent? What would be the result of such a statute? Simply, that under the well settled principles of law, real property on the death of the owner would escheat to the state. The conditions under which property shall escheat may be narrowed or enlarged by the legislature of the state. If the state declares that an intestate owner shall have no heirs who may take such property, then the condition is produced under which an escheat must follow. Learned counsel appear to assert that there is some restraining principle which would control such action by the state, but they have studiously refrained from indicating where such principle can be found or by what authority it is established. The right of the state to take where there are no competent heirs is well founded. Title by escheat was originally an incident of feudal tenures, by which, for failure of heirs or corruption of blood, by conviction of certain crimes, the feud fell back into the lord's hands by a termination of the tenure. In this country, dying intestate without heirs is the only ground of escheat, and in Washburn on Real Property, p. 443, it is said:

“Considered in this light, escheat of lands may be regarded as merely falling back into the common ownership of the state, from which they were theoretically originally derived, because the tenant did not see fit to dispose of them in his life-time, and left no one who, *in the eye of the law*, has any claim to inherit them.”

And in *Wallace v. Harmstad*, 44 Pa. St., on p. 501, it is said:

“Escheat, with us, depends on positive statute, which makes the state the heir of the property on

defect of known kindred of the decedent. Nothing about it but the name is feudal."

In *Hughes v. The State*, 41 Tex., p. 17, it is said:

"And, as under the general doctrine of tenures in the American States, the state occupies the place of the feudal lord by virtue of its sovereignty, it is universally asserted that, when the title to land fails for lack of heirs or devisees, who may lawfully take, it reverts or escheats to the state as property to which it is entitled";

and Chancellor KENT, 4th Com., 471. says:

"It is a general principle in the American law, and which, I presume, is everywhere declared and asserted, that when the title to land fails from defect of the heirs or devisees, it necessarily reverts or escheats to the people, as forming part of the common stock to which the whole community is entitled. Whenever the owner dies intestate, without leaving any inheritable blood, or if the relations whom he leaves are aliens, there is a failure of competent heirs, and the lands vest immediately in the state by operation of law";

and on page 472, he says:

"That property should, in such cases, vest in the public, and be at the disposal of the government, is the universal law of civilized society."

This rule with reference to the state succeeding in the absence of persons who may lawfully take, applies as well to personalty as it does to realty. Blackstone in discussing title by occupancy, book 2, page 401, says:

"And, first, a property in goods and chattels may be acquired by occupancy; which, we have more than once remarked, was the original and only primitive method of acquiring any property at all, but which has since been restrained and abridged by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments,

legacies and administrations, have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which has once been acquired by the owner. And where such things are found without any other owner, they for the most part belong to the king by virtue of his prerogative ;”

And on page 402:

“Thus again, whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor, and, as such, are returned into the common stock and mass of things.”

In the chapter on title by testament and administration, second Blackstone, he shows on page 493, that the old common law of England is abolished and :

“A man may devise the whole of his chattels as freely as he formerly could his third part or moiety.”

And on page 494:

“In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was and is said to die intestate, and in such cases, it is said that by the old law the king was entitled to seize upon his goods as the *parens patriæ*, and general trustee of the kingdom * * * the goods, therefore, of intestates were given to the ordinary by the crown, and he might seize them and keep them without wasting and also might give, alien or sell them at his will, and dispose of the money in *pious usus*.”

Hence the statutes in the different states which provide for the settlement of estates by public administrators, direct the sale of personalty, and the payment of such debts as may be proved and the payment into the state or county treasury of the residue arising from the sale of such chattel property to be held for the use and purposes

of the state, where no person lawfully entitled to receive the same under the laws of the state makes any claim to it.

The state then by virtue of its sovereignty, having the absolute right to declare who shall be competent to inherit, may declare that no individual shall be competent to inherit and such declaration would neither be "spoliation" or "confiscation" nor a "bill of attainder" as is declared in fervid terms of counsel. To suggest that such legislation would be unwise or unusual merely goes to the policy of such legislation, but not to the power of the state to enact it.

It is true, as counsel concede, that in the cases now before the court it is not necessary to decide whether the legislature of any state can destroy the right of inheritance or devise and bequest. The state here has not attempted to do so. To vindicate the power of the state in that regard should not be necessary in this case because regulation of succession and inheritance is all that the statute under consideration attempts. Our excuse for entering upon the discussion is found in the fact that counsel, notwithstanding the above quoted admission, sound in the prelude of their argument, and carry throughout their brief, as the dominating, though frequently discordant note of their contention, the denial of the absolute power of the state to control the transmission of a decedent's property.

IV.

THE STATE MAY EXACT A SUM OF MONEY AS A CONDITION OF PERMITTING THE INHERITANCE OF PROPERTY AND SUCH EXACTION IS NOT A PROPERTY TAX.

From the fact already demonstrated that inheritance or succession to the property of a decedent is a privilege granted by the free grace of the state, it results :

A. That the state may rightfully in the exercise of legislative discretion impose conditions upon which the privilege is to be enjoyed ; and,

B. That where the state reserves to itself a sum of money which it exacts as a condition of inheritance or succession it is not a tax upon property in the legal sense of the term, but is rather an excise or duty imposed on the privilege.

A. The state may attach conditions to privilege granted.

In *Eyre v. Jacob*, 14 Grat., 427, the court said :

“ Possessing this sweeping power over the whole subject, it is difficult to say upon what ground its right to appropriate a modicum of the estate, call it a tax or what you will, as a condition upon which those who take the estate shall be permitted to enjoy it can be successfully questioned. That the tax is confined to collateral inheritances and devises and devises to others than those specified presents no difficulty ; it is the will of the legislature to make this discrimination and its discretion upon the subject must be regarded as having been duly and properly exercised.”

In *Mager v. Grima, et al.*, 8 How., 490, this court, speaking by Mr. Chief Justice TANEY, said :

“ And if a state may deny the privilege altogether

it follows that when it grants it it may annex to the grant any conditions which it supposes to be required by its interests or its policy."

In *United States v. Perkins*, 163 U. S., 625, Mr. Justice Brown, speaking for the court, said:

"Similar restrictions upon the power of disposition by will are found in the codes of other continental countries as well as in the State of Louisiana, though the general consent of the most enlightened nations has from the earliest historical period recognized a natural right in children to inherit the property of their parents, we know of no legal right to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good. * * * Certainly if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect."

And the learned justice quotes with approval from *State v. Dalrymple*, 70 Md., as follows:

"Possessing, then, the plenary power indicated, it necessarily follows that the state in allowing the property to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions not in conflict with or forbidden by organic law as the legislature may deem expedient. These conditions, subject to the limitation named, are consequently wholly within the discretion of the General Assembly."

B. The sum exacted by the state for the excise of the privilege is not a property tax.

In *Erye v. Jacob*, *supra*, it is said:

"If the tax imposed had been a fixed and arbitrary sum, it would scarcely have been said to be a tax on property, although every tax for which the property of the taxpayer is liable might be called a tax on

property in a certain sense, but the argument is that as the tax is a certain per centum of the value of the estate and the property pays it, it is therefore a tax on the property itself. But this is by no means a necessary logical conclusion. The intention of the legislature was plainly to tax the transmission of property by devise or descent to collateral kindred; to require that a party thus taking the benefit of a civil right secured to him under the law should pay a certain premium for its enjoyment; and as it was thought just and reasonable that the amount of the premium should bear a certain proportion to the value of the subject enjoyed, it is fixed at a certain per centum upon the value of the whole estate transmitted."

In *State v. Hamlin*, 86 Me., 495, where the whole subject of the nature of this kind of impost is intelligently considered and discussed, it is said:

"The tax provided for in the statute under consideration is clearly an excise tax. The whole tenor and scope of the act is one of excise and not a tax upon property as that term is used in the constitution. It is not laid according to any rule of proportion, but is laid upon the interest specified in the act, without any reference to the whole amount required to be raised for public purposes, or to the whole amount of property in the state liable to be assessed for public purposes. * * * Substance and not form or phrase is the important thing. All exactions of money by the government are taxes, but they are not all levied by assessment upon value. The latter class refers to the burdens recurring periodically, which are assessed upon valuations of property made at stated intervals. * * * The tax under this statute is once for all an excise or duty upon the right or privilege of taking property by will or descent under the law of the state * * * it is not levied as property taxes usually are. There is no given sum to be assessed in which the percentage is fixed by valuation, but the percentage is fixed by law, leaving the amount to be ascertained by

valuation. The value of the property is resorted to to measure the amount of the excise."

And in *Minot v. Winthrop*, 162 Mass., 133, it is said :

"Taxes on legacies and inheritances or on successions in any form to property on the death of the owner have generally been considered not as taxes upon property, but as excises upon the privilege of taking or transmitting property in this way."

In *Wallace v. Myers*, 38 Fed. Rep., 184, speaking of tax on legacies and successions imposed by the act of Congress of June 30, 1864, the court said :

"The subject-matter of the assessment under that act was held by the Supreme Court in *Scholey v. Rew*, 23 Wall, 231, to be the devolution of estates or the right to become beneficially entitled to it and the act was considered as taxing a privilege and not property * * * The precise question now presented was considered by the Supreme Court of Pennsylvania in *Strode v. Commonwealth*, 52 Penn. St., 181, and the court treated the statute not as taxing property but as a regulation of the transmission of the property of decedents and upon that view held that government securities were properly included in the valuation of the inheritance upon which the tax was assessed."

In *Scholey v. Rew*, *supra*, Mr. Justice CLIFFORD, speaking for the court said of the succession tax imposed by the statute then under consideration :

"But it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of those provisions ; instead of that it is plainly an excise tax or duty authorized by section 8 of article I which vests the power in Congress to lay and collect taxes, duties, imposts and excises to pay the public debts and provide for the common defense and general welfare."

And in *United States v. Perkins*, *supra*, this court said :

“That the tax is not a tax upon the property itself, but upon its transmission by will or descent is also held, both in New York and in several other states * * *. We think, therefore, that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax and it is only upon this condition that the legislature assents to a bequest of it.”

V.

THE LEGISLATIVE DISCRETION AS TO THE CLASSIFICATION OF PERSONS WHO MAY INHERIT, AND THE ENUMERATION OF CLASSES THAT SHALL PAY THE EXCISE, AND THOSE WHO SHALL BE EXEMPT FROM IT, MUST IN ITS VERY NATURE BE FREE FROM EXTERNAL CONTROL OR JUDICIAL REVIEW.

Learned counsel for plaintiffs in error have frequently denounced the act of the legislature in question as arbitrary. The word “arbitrary” has different meanings—one,

“not regulated by fixed rules or law, determinable as occasion arises, subject to will or judgment; discretionary”;

another :

“Despotic ; tyrannic.”

Discretion is a power or right conferred by law of acting officially in certain circumstances according to one's own judgment or conscience, uncontrolled by the judg-

ment or conscience of others. In legislation, the deliberate, cautious judgment of the law making power.

Anderson's Law Dictionary.

Whenever discretion is committed to the legislature, it is to be exercised uncontrolled by the judgment or conscience of other departments of the government. Such discretion is not arbitrary in the sense of being despotic, as learned counsel in their use of the word seem to imply. The legislature has discretion to classify successions and inheritances. The privilege of succeeding to, or inheriting property is granted by the free grace of the legislature to whatever persons or classes of persons are designated to enjoy it. No person or class, as we have already seen, has any natural or original right to such a privilege. Counsel admit the right of the legislature to distinguish between lineals and collaterals, and to impose a burden upon the one class that is not imposed upon the other. The right to classify being admitted, it must follow that the legislature is free to impose the heavier burden on whichever class it sees fit—that is, there is no rule which could prevent the legislature from taxing successions to lineals at a higher rate than those to collaterals. Could a statute so disposing the tax be declared arbitrary and held void by a court as denying to the lineals the equal protection of the laws? Counsel contend that the legislature has no power to discriminate by classifying successions as to amounts, and imposing a higher rate of tax on one amount than on another, but they admit, what is fully established by the authorities, that the legislature may fix an amount and determine that inheritances, successions or estates, which fall below such amount in value, may be transmitted without the imposition of the

tax, while the tax is imposed upon those which exceed in value the stated amount. In fixing such amount, it is very clear that the legislature exercises an official discretion that is not subject to any external control. No rule can be pointed out which limits the legislature in fixing an amount, and in declaring that estates below that amount shall be exempt from succession tax and duties; neither can any rule be prescribed or laid down that will control the discretion of the legislature in enumerating the classes that shall be exempt from succession or inheritance tax.

In New York, one class of persons has been exempted from the tax, and estates or legacies or successions not to exceed \$500. in value; in Pennsylvania, a different class is exempt, and the amount exempted is fixed at \$250.; in Maryland, estates not to exceed \$500. are exempted; in West Virginia, \$1,000. is the amount; in Connecticut, \$1,000.; California, \$500.; in Massachusetts, not exceeding \$10,000.; and the United States Succession Tax Law, passed in 1862, exempted property passing to husband or wife, and also estates not exceeding \$1,000. in value; and finally, in Illinois, by the law under consideration, estates of \$20,000. passing to a certain class, in the law designated, are exempt from the tax.

(For a complete statement of exemptions in the different states, see Dos Passos, pp. 77 to 92.)

By what rule did the legislatures of these different states arrive at the respective amounts which they have elected to exempt from the burden of the tax, and what test can be applied to determine the correctness and reasonableness of any of these exemptions, and to con-

demn any of the others? Is it not manifest that the amount which shall divide inheritances to be taxed from those which shall be free must be fixed at some definite figure arrived at by the legislature in the exercise of legislative wisdom and discretion, and without the restriction of any directing or controlling rule whatever.

When the right of the legislature to fix in its discretion a limit in amount above which taxes shall be imposed, and below which inheritances shall be untaxed, is admitted the contention against graduated or progressive taxation is abandoned. Suppose the legislature to provide that legacies not exceeding \$1,000. shall be exempt; legacies above \$1,000. and not exceeding \$2,000. shall pay three per cent, legacies above \$2,000., and not exceeding \$3,000. shall pay six per cent; that legacies or successions exceeding \$3,000. and not above \$4,000. shall pay nine per cent; does not the concession to the legislature of the right to exempt \$1,000., and subject legacies in excess thereof to a tax, determine the right of the legislature to impose upon legacies of \$2,000. a different rate of taxation from those below that amount? The difference between no tax and three per cent. is not greater than the difference between three per cent. and six per cent., or between six per cent. and nine per cent. The argument is ended when, at the inception of the discussion, the right to exempt one and tax another is conceded.

It is a great mistake to suppose that rights and privileges granted by the legislature cannot be graduated and determined by the amount of money involved. Take the jurisdiction of courts for

example. Surely the equal protection of the law is due to the citizens in the assertion of their rights in court, and in prosecuting or defending actions or suits; yet one is denied access to the United States Court, while another is admitted to sue therein, though the question of fact and of law involved in the claims of each may be identical, and the distinction which debars the one and admits the other is the amount in controversy. The amount which distinguishes between the privilege of these two citizens is fixed by Congress, and is the exercise of an uncontrollable, and what counsel call, an arbitrary discretion.

So the privilege of appeal is one of great value. It might well be contended that it should be enjoyed by all suitors alike, yet it is almost the universal practice of the legislatures of the different states to allow or deny the privilege of review on the distinction of the amount involved, and that amount is one determined by the uncontrolled and indisputable discretion of the legislature. There is no natural right of appeal. It is a privilege granted by the statute, and, upon the granting of which, the legislature has a right to impose such conditions as it sees fit.

There is also a distinction between grand and petit larceny. Two persons, the moral qualities of whose offenses are identical, are differently punished—the one branded as a felon and incarcerated in the penitentiary; the other subjected to a light fine, or a brief imprisonment in the local jail, upon a distinction which is arbitrary as to the amount in value of the property stolen. Do the legislatures in declaring the amounts—and it is different in different states—which is the only distinction which varies the burden of punishment, deny to the culprits the equal protection of the law? If not, then when the state grants to different classes of persons the right of

succession or inheritance, and imposes upon one class a burden, from which another is relieved, there is no denial to its citizens of the equal protection of the laws. This court has said, in answer to the contention that a state denied the equal protection of the laws and, therefore, violated the Fourteenth Amendment by forbidding some of its citizens access to a tribunal which others of them enjoyed :

“ It (the Fourteenth Amendment) “ contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which said regulations are made.
* * * It is the right of every state to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person its equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction as to the equal protection of the law is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases and under like circumstances to resort to them for redress.”

Missouri v. Lewis, 101 U. S., 22.

Another illustration of the right of the state to impose burdens, graduated with reference to arbitrary amounts upon the privileges which it grants, and one most aptly in point, is found in the laws of the different states pre-

scribing the fees or impost to be paid for the privilege of being a corporation.

The franchise to be a corporation is granted by the state. Upon one corporation taking power to carry on a certain business, with a capital stock of \$10,000., one fee or tax is imposed, and upon another taking precisely the same powers, but having a capital stock of twenty or one hundred thousand dollars, a different one, and in both cases, the fee or amount exacted is arbitrarily fixed, and with no reference to a proportion between the rate and amount of capital. Probably in no state in the Union is the fee or tax imposed on the privilege of assuming corporate powers, fixed proportionately on the amount of capital stock, or upon any other measure of the value of the franchise granted. The granting of corporate charters has become in recent years a source of great revenue in some states, and the rates or charges for incorporation are fixed in many states with the manifest purpose of raising revenue. What is the essential distinction between classifying corporations according to the amount of their capital, and taxing the corporate privilege at one rate for one capital, and at a higher or lower rate for a different amount of capital, and classifying the privilege of succession by amounts and taxing those of different amounts at different rates?

This court has in many cases laid down the rule that corporate privilege may be granted, and corporations taxed on any conditions or theories which the state may prescribe.

In *Home Insurance Co. v. New York*, 134 U. S., 594, it was determined that the validity of a state tax on corporations created under its laws or doing business within

its territory, can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount which it will exact for the franchise. The statute in question there imposed a tax upon the corporate franchise or business of the company, and reference was made to the capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

Mr. Justice FIELD, who delivered the opinion of the court, said :

“ By the term ‘corporate franchise or business,’ as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the state to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which

it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. * * * Its action in this matter is not the subject of judicial inquiry in a Federal tribunal."

And the learned justice quotes for the sake of reiterating, the following language from *Deleware R. R. Tax Case*, 18 Wall., 296 :

"The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state ; our only concern is with the validity of the tax ; all else lies beyond the domain of our jurisdiction."

And he interprets the case of *California v. Pacific Railroad Co.*, 127 U. S., 1, as declaring :

"that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose ; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the legislature of the state ; it cannot be furnished by the Federal tribunals."

In *Monroe Savings Bank v. City of Rochester*, 37 N. Y., 365, quoted approvingly, by Mr. Justice Field, the court held that the powers and privileges which consti-

tute the franchises of a corporation were in a just sense property, quite distinct and separate from the property which, by the use of such franchises, the corporation might acquire; that they might be subjected to taxation if the legislature saw fit to so enact; that such taxation being within the power of the legislature, it might prescribe a rule or test of their value.

In the opinion it was said:

“It must be regarded as a sound doctrine to hold that the state, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenues of the state. If the grantee accepts the boon, it must bear the burden.”

The Inheritance Tax Law of Illinois is not only right in principle, but by comparison with the laws of other states it will be found to be more liberal in its exemptions with respect to amounts, and moderate in its exactions than any inheritance tax law in the United States. (See appendix.) And in view of this fact we submit that the allusions of counsel to “arbitrary or spoliative legislation,” “bills of attainder,” “the passion or caprice of a majority,” “confiscation of property” and other like expressions are without force or application and tend to excite prejudice rather than to aid the court in its efforts to administer the law.

VI.

THE DISTINCTION BETWEEN TAXES ON PROPERTY AND EXCISES, IMPOSTS OR TAXES OF PRIVILEGES IS WELL DEFINED.

Whenever the state courts or this court have been called on to discuss the right of the state to impose an impost or duty upon the grant of a privilege or a franchise, the language of the court with reference to the discretion of the legislature is very different in tone and in sense, from that used where the matter under consideration is the levying of taxes upon property which is owned or held by individuals or corporations. So in the *State v. Hamlin*, 86 Me., on page 505, the court, in speaking of the principle of uniformity, say :

“It is necessary to make such excise uniform as to the entire class of collaterals. It must not tax one and exempt another in the same class. But it is not a violation of this principle to require an excise from all collaterals and strangers, and exempt from the excise classes nearer in blood to the decedent.
* * * An excise tax upon the value of the property so allowed to be received by the collateral or stranger to the blood, leaves him in much better condition than an absolute withdrawal of the privilege would. He cannot complain of unjust taxation, when the state allows him to take a property subject to a duty of two and one-half per cent., when the state has the right to exclude him from the whole.”

In *Tyson, et al. v. State*, 28th Md., 580, the contention against the law, was that the legislature could impose no tax which was not equally apportioned, on every other species of property within the state, in proportion to its value. The law imposed a tax upon collateral inheritances only. The court said that the constitution provided that :

“Paupers are exempted from assessment ; and all other persons are required to pay their proportion of public taxes, according to the value of their property. Arbitrary taxes on property without regard to value, are expressly prohibited, and all measures for the collection and imposition of taxes upon *property*, are required to conform to this general principle of equality. Whilst thus providing for a *uniform* mode of taxation on property, it was not the purpose of the framers of the constitution to prohibit any other *species of taxation*, but to leave the legislature the power to impose *such other* taxes as the necessities of the government might require.”

The italicized words in the above quotation, appear in the opinion of the court as published, and clearly were emphasized to mark the distinction between the requirement of uniformity as to taxes upon property, and other forms of tax, and as indicating that the legislature was not limited by that rule, when imposing a duty upon the privilege of inheritance.

And in *Eyre v. Jacob*, 14 Grattan, 422, in answer to the suggestion that the tax was not equal and uniform, the court say :

“It has been held in several of the states, that the terms ‘equal and uniform,’ apply only to a direct tax on property, and that the clause by which such equality and uniformity is prescribed does not limit the power of the legislature as to the objects of taxation but is only intended to prevent an arbitrary taxation of property according to kind and quality without regard to value. Hence specific taxes have been sustained as a valid exercise of the legislative power.”

So in *Minot v. Winthrop*, 162 Mass., on page 122, the court, in sustaining the constitutionality of the tax, held that it did not come under the rule of direct taxation upon property, but under the other condition expressed in the

constitution, that duties and excise must be reasonable, and the court quotes from a prior case as follows :

“The power to determine what callings, franchises or privileges, or, to use the language of the constitution, ‘commodities,’ shall be subjected to an excise, and the amount of such excise belongs exclusively to the legislature. The provision that it must be ‘reasonable’ was not designed to give to the judicial department the right to revise the decisions of the legislature as to the policy and expediency of an excise. Great latitude of discretion is given to the legislature in determining, not only what ‘commodity’ shall be subject to excise, but also *the amount of the excise and the standard or measure to be adopted as the foundation of the proposed excise.* The court cannot declare a tax or excise illegal and void, as being unreasonable, unless it is unequal, or plainly and grossly oppressive, and contrary to common right.”

And to the objection that the exemption of \$10,000. rendered the law unconstitutional, the court, on page 124, says :

“The statutes of the different states and nations which have levied taxes on devises, legacies and inheritances have usually made exemptions, and these have sometimes related to the value of the estates, and sometimes to the value of the property received by the heirs, devisees, legatees or distributees. The exemption in the statute under consideration is certainly large as an exemption of estates, *but it is peculiarly within the discretion of the legislature to determine what exemptions should be made in apportioning the burdens of taxation among those who can best bear them, and we are not satisfied that this exemption is so clearly unreasonable as to require us to declare the statute void.*”

In *U. S. v. Perkins, supra*, where a tax upon a legacy to the United States was sustained by this court as being, not a tax upon property, but a diminution from the legacy

before it became the property of the United States, the fact that New York state, by its statute, exempted certain portions from taxation was present to the mind of the court, and the court said:

“ We think that having regard to the purpose of the law to impose a tax generally upon inheritances, the legislature intended to allow an exemption only in favor of such corporations as it had itself created, and which might reasonably be supposed to be the special objects of its solicitude and bounty.”

And in *California v. The Central Pacific R. R. Co.*, 127 U. S., 1, heretofore quoted, Mr. Justice BRADLEY, in giving the opinion of the court, speaking of the power to tax corporate franchises, said it was arbitrary in character, and added :

“ It has no limitation but the discretion of the taxing power. The value of the franchises is not measured like that of property, but may be ten thousand dollars or ten hundred thousand dollars, as the legislature may choose, or without valuation of franchise at all, the tax may be arbitrarily laid.”

Mr. Thompson, in the fourth volume of his *Commentaries on the Law of Corporations*, Sec. 5557, treating of the tax upon franchises, says :

“ The question whether given taxes are to be regarded as taxes upon the property, or upon the franchises of corporations, has been often controverted. The importance of the question has lain in the fact that, under state constitutions requiring, in various forms of expression, all taxes to be equal, uniform, or proportional, the schemes of taxation which have been held valid on the ground of being taxes upon the franchises of corporations, and not upon their property, would admittedly have been held unconstitutional and void, if regarded as taxes upon their property merely. * * * *So, a statute laying a franchise tax is not subject to a constitutional provision requiring property to be assessed for taxes*

under general laws, and by uniform rules, according to its true valuation; and in those states having constitutional provisions prohibiting the unequal taxation of property, it seems to be uniformly held that such provisions do not inhibit the legislature from laying indirect taxes upon franchises, privileges, trades and occupations."

And, in a recent case in New Jersey, the *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq., 270, where the constitutionality of the tax was challenged as violating the provision of the constitution providing

"That property shall be assessed for taxes under general laws and by uniform rules, and according to its true value,"

the court said:

"The tax, payment of which is sought to be enforced by this proceeding, does not fall within that constitutional provision. The power of the legislature to impose taxes on persons, property, business, and franchises is unlimited, save only by such restrictions upon the exercise of that power as are found in the organic law, or such as are inherent in the nature of the subject. The fault of this position is the assumption that this tax is one upon property. Such, manifestly, is not the case. The law in question imposes a tax on certain corporations by way of a license for exercising corporate franchises. It is declared to be such tax by the act, and, although it is laid on this class of corporations with respect to the capital stock, the tax possesses the legal quality of a license or franchise tax. * * * Upon the power of the legislature to impose such a tax, there exists no restriction in our constitution. *As a license or franchise tax, it is not within the equality clause of the constitution referred to. In those states in the Union having constitutional provision requiring equality in the taxation of property, it is uniformly held that such provisions do not abridge or apply to the legislative power of indirect taxation by taxes on franchises, privileges, trades and occupations.*"

“It is peculiarly within the province of the legislature to declare what privileges shall be taxed and what exemptions may be allowed, in order to make taxes bear most lightly upon those least able to bear them ”

State v. Alston, 30 S. W. R., 750.

In Montana the law exempted estates of \$7,500. in value. The Supreme Court held, after a careful review of the authorities, that exemptions were in the discretion of the legislature, and that the fact of such an exemption did not render the act void or make the tax unequal.

Gelsthorpe v. Furnell, 51, Pac. R., 267.

Cooley in his work on Taxation, page 392, says :

“Where privileges are taxed, any occupation which is not open to all, but can only be exercised under license from some constituted authority is to be regarded as a privilege, and succession to inheritance may be taxed as a privilege, notwithstanding the property of the estate is taxed, and taxes on property are required by the constitution of the state to be uniform.”

We, therefore, contend that the line between the power of the state in imposing a tax upon property and in imposing fees, excises or taxes upon franchises or privileges granted, is distinctly marked ; that while the rule of uniformity and equality may be required as to the one, it does not control the legislature in dealing with the other. The power of the state to exempt the privilege or franchise to one class and exact the impost from another, is admitted save in two states, and the only rule of uniformity ever asserted as limiting legislative discretion, is, to apply, not between classes, but between members of the same class. The Supreme Court of Illinois is, therefore, in

perfect accord with all the leading authorities, in holding that the provision of the constitution of the state requiring that such revenues as may be needful shall be provided:

“by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her or its property”

was not violated by the statute now under consideration, for the court stated in its opinion that:

“a tax which affects the property within a specific class is uniform as to that class, and there is no provision of the constitution which precludes legislative action from assessing a tax on that particular class.
* * * The tax assessed on classes thus created is absolutely uniform on the classes upon which it operates, and under the provisions of the statute is to be determined by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property inherited.”

VII.

CASES RELIED ON BY APPELLANT.

Counsel cite four cases, which they say involved the question of progressive taxation, in the States of Minnesota, Wisconsin, Ohio and New Hampshire, and in which it is argued that laws similar in principle to the statute of Illinois were declared void, as in violation of the constitution of those states.

The case decided in Minnesota, *The State v. Gorman*, 40 Minn., 232, deals with the statutes of that state, which, in lieu of the fees, costs and perquisites theretofore allowed by law, as compensation for the services of judges of probate, and:

“for the purpose of reimbursing the county

treasurer for the salaries provided to be paid, in this act, the judge of probate, it shall be the duty of each executor, administrator or guardian to pay or cause to be paid to the county treasurer, for the use and benefit of the county in whose Probate Court proceedings are to be instituted, settle the estate of any deceased person * * * the following sums, according to the value of the estate and property of such deceased person."

The court held that the sums required to be paid into the county treasury "must be regarded as taxes in the ordinary sense of that word, and as it is used in the constitution."

Holding the exactions to be taxes in the general and precise meaning of the word, the court determined that there was a violation in apportioning the burden imposed, of the constitutional rule of equality, measured with reference to the value of the property taxed; and they say: "In the first place estates not exceeding \$2,000 in value are wholly exempt from any contribution. If estates are taxable in this manner at all, such an exemption is contrary to the requirements of the constitution."

It is very plain that the law of Minnesota was not a succession or inheritance tax or impost or excise upon the right of transmitting or succeeding to property. It does not appear to have been suggested by any of the counsel in the case that the law could be treated as a tax inheritance law, and there is not the slightest allusion in the opinion to any such question, and it is apparent that no such question or principle was present to the mind of the court in deciding the case.

In the *State ex rel Sanderson v. Mann*, 76 Wis., 469, the court determined that the law imposed a tax upon the estate. In distinguishing the statute under consideration

from statutes imposing succession or inheritance taxes, the court said :

“ It is claimed that the exaction in question is nothing more than a succession tax, and as such constitutes a distinct class, and hence is not in violation of the rule of uniformity mentioned. Such a tax is essentially a tax upon the transmission of estates by devise, bequest or descent, and not, properly speaking, a tax upon the property constituting the estate before the same is thus transmitted. The view we have taken of this case renders it unnecessary to determine whether such a tax may lawfully be imposed, under our constitution. * * * Of course, the rights of heirs, devisees and legatees, in a certain sense, become vested at the death of such testate or intestate. * * * A succession tax would necessarily be imposed upon the respective parties thus succeeding to such residue. (*Commonwealth's Appeal* ; 127 Pa. St., 438, and *Mason v. Sargent*, 104 U. S., 689.) But the tax in question is not upon such succession, but upon the whole estate at its appraised value, regardless of whether it is solvent or insolvent. * * * Manifestly the burden imposed, is not a succession tax, but a tax upon the whole estate, regardless of whether it is solvent or insolvent.”

The court having thus plainly distinguished the statute which they were considering from a statute imposing a tax upon the succession or inheritance, determines that the tax cannot be sustained for the reason that it violates the rule of uniform taxation, required by the constitution, and also upon the ground that it is special legislation, applying only to Milwaukee County, and thus violates the provision of the constitution requiring tax laws to be general in their operation.

The court clearly understood the Minnesota case to deal with a statute similar in purpose and effect to that of Wisconsin.

They say : " We are pleased to note that two courts of high authority have each recently come to the same conclusion in respect to a similar enactment." Citing *State ex rel Davidson v. Gorman*, 40 Minn., 232, and *In Re Ruan Street*, 19 Atl. Rep., 219.

The cases decided in New Hampshire and in Ohio stand by themselves, and the determination of each case upon what the courts state to be peculiar provisions in the constitutions of both of these states. In each state the right to classify property or privileges and to designate one class as exempt from the tax or impost is denied, because forbidden by the constitution. The New Hampshire court concedes that in the absence of constitutional prohibition the legislature would have power to impose conditions by way of tax upon successions, but says that whether a tax on property or on a privilege the principle of equality must control.

The Ohio court says that by the exemptions of not to exceed \$200. worth of personal property, a construction of the bill of rights is "evinced to the effect that in taxation of subjects other than property an exemption up to \$200. in value would be regarded as for the equal protection and benefit of the people. The exemption must be equally for all and the rate per cent. must be the same on all estates."

That leaves no discretion in the legislature either to exempt or to classify as between different classes of relatives. All persons, not all classes, are to be treated alike. The case, therefore, is in direct conflict with the doctrine of this court applying the Fourteenth Amendment to the subject of taxation.

In *Pacific Express Co. v. Seibert*, 142 U. S., 329, it is said :

“This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms.”

In *Bell's Gap Railroad v. Pennsylvania*, 134 U. S., 232, it is said:

“The provisions of the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all. * * * It may impose different specific taxes upon different trades and professions, and may vary, the rate of excise upon various products. * * *

We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation.”

In the case of *Merchants' Bank v. Pennsylvania*, 167 U. S. 461, it is said:

“Suppose, for any fair reason affecting only its internal affairs, the state should see fit to wholly exempt certain named corporations from all taxation. Of course, the indirect result would be that all other property might have to pay a little larger rate per cent., in order to raise the revenue necessary for the carrying on of the state government; but this would not invalidate the tax on other property or give any right to challenge the law as obnoxious to the provisions of the Federal constitution.”

Counsel for the plaintiffs in error have, in their briefs cited language from decisions of this court in various cases, which they contend is to be applied to and covers the contention involved in this case.

Such detached sentences from opinions, separated from their context and read without relation to the question which was before the court for consideration, may appear to sustain the argument they are quoted to support. The cases from which these excerpts are taken, wherever they bear even remotely on the question here involved, will be found to relate to *taxation of property*. Such cases neither in their discussion or determination deal with the rules which shall govern the legislature in imposing excises, imposts or other conditions on privileges granted by the state to corporations or natural persons. This is also true of the numerous cases from the different state courts cited by counsel. The greater number of the last named cases are devoted to the consideration of special assessments. We have no controversy with the rules announced in these various cases when applied, as they must be, to questions involving the taxation of the property of individuals or corporations. It is unnecessary for us to examine these respective cases in detail, or to burden this court with a discussion of them *seriatim*. They may be properly disposed of in this argument, and will be necessarily excluded from the attention of this court in determining the question here presented by invoking the rule stated by Chief Justice MARSHALL in *Cohens v. Virginia*, and quoted in the opinion of Mr. Chief Justice FULLER in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., on page 574 :

“It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious.

The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

VIII.

POLICY OF PROGRESSIVE INHERITANCE TAXATION.

The distinguished counsel for the plaintiffs in error are not content with assailing the inheritance tax law of Illinois on constitutional grounds, and subjecting it in that regard to the ordinary judicial tests; they carry the discussion into what they term "the realm of practical statesmanship," and invite this court "in the service of politics" to a consideration of the arguments against progressive taxation found in the writings of various political economists, historians, and theoretical essayists. We are not disposed to follow counsel very far into what, if we were addressing our remarks to a legislative body, might prove an interesting and profitable field for investigation and discussion. The policy of a particular system of taxation is one to be determined by the legislative power and the wisdom or unwisdom of such determination all courts have constantly declined to discuss for the all-sufficient reason that such a question the courts have no authority to decide.

It is to be noted that with one exception the quotations made from these various writers in opposition to progressive taxation relate to progressive taxation upon *property*. Rene Stourm appears to be the only one who opposes inheritance taxes, and, according to counsel's in-

terpretation, he bases his objection to progressive inheritance taxes on the ground that such taxes "*involve an attack upon the natural right to dispose of property.*" As there is no such natural right, the conclusion of a writer founded on such a premise should carry but little weight.

It is admitted by counsel that many writers, and among others Mill, whose reputation as an economist will not suffer by comparison with any other, argue the propriety and justice of progressive inheritance taxes and contend that such taxes present different considerations from those pertaining to taxes upon property.

True, we have the statement of learned counsel that these writers fail to point out any sound distinction, but, as we have hereinafore shown the difference between taxing property and taxing privilege, to have been recognized and asserted by this court as well as by a number of the State courts, and have, as we believe, shown the failure, perhaps the unwillingness of learned counsel to perceive such distinction, their criticism of the reasoning of the economists who are opposed to them may be ascribed to their enthusiasm as advocates rather than to their acumen as logicians.

Mr. Lecky, the writer who is quoted most extensively, and who is known as a historian, and not as an economist, and who wrote the work cited very much in the character of a partisan apologist for reactionary Toryism in Great Britain, states as one, if not his chief objection, that graduated taxation tends to discourage the accumulation of property. In that he is voicing the sentiment of the classes in Great Britain, and supporting the policy which more than anything else has tended to create class distinctions in that country, to wit: primogeniture;

which rule of descent has been discarded by all of our states, and repudiated by the national government, when in the ordinance of 1787 it declared that estates, of both resident and non-resident proprietors in the north-west territory, "dying intestate, shall descend to and be distributed among their children and the descendants of a deceased child in equal parts."

Mr. POMEROY, in his work on Municipal Law, after discussing primogeniture and the rule of descent in Great Britain, says, on page 473 :

"It will be seen that unless an estate is inherited by several female heirs who take equal shares, it cannot be subdivided, but must descend entire to a single heir. This rule of law has the effect to preserve land in the same families and to restrict its diffusion to an extent unknown and impossible in this country."

And, on page 475, he says :

"The policy of our institutions is to preserve lands in commerce with a perfect freedom of acquisition and transfer, *and to prevent their accumulation in families.* This has been effected by admitting all relations in the same degree to inherit equal shares of an estate."

The accumulation of vast aggregations of capital, consisting principally of money or movables in the hands of individuals, is one of the marked tendencies in our country in these latter days, which has caused concern if not alarm in the minds of the most thoughtful and patriotic of our citizens. Such aggregations of enormous personal wealth in the hands of particular families and corporations have given, it is widely believed, to a portion of our population, comparatively small in numbers, an undue and dangerous influence upon the legislation of Congress as well as of the several states.

The operation of a progressive inheritance tax law is not, indeed, to prevent the accumulation of capital, but the tendency of its influence is to disperse or diffuse such capital among many persons by the testament of the decedent.

Dr. Max West, author of a work on Inheritance Tax, in an article in the Review of Reviews for February, 1893, remarks that "the tax has been found to be quite satisfactory in its practical operation and productive of very considerable revenues. It has not driven away capital, because men would rather pay their taxes after death than at any other time."

While it may be true that men will more willingly surrender the portions of their property that is due to the government when they can no longer make use of it, it is more than likely that the ruling passion of the accumulators of such large estates, to defeat the tax collector and evade their just proportion of taxation, will be strong in death, and if so, the direct influence of a progressive inheritance tax will be to induce the testator to distribute his estate among a larger number of his relatives, lineal and collateral, instead of leaving it in larger bulk to one or two.

In this view the natural operation of such a law is in accord with our American policy as to the diffusion of property and the breaking up of large estates, and is the very opposite of the policy which obtains in Great Britain.

This is no impugnement of men of wealth as a class, for it would be untrue to assert that they all look with disfavor upon laws which prevent property from escaping taxation. Mr. West, in the article above quoted from

says that Mr. Carnegie agrees with Edward Bellamy in approval of progressive inheritance taxes, and that both of them would like to see an inheritance tax rising as high as fifty per cent. in the case of multi-millionaires, and he quotes Mr. Carnegie as saying :

"Of all forms of taxation this seems to be the wisest. Men who continue hoarding great sums all their lives, the proper use of which for public ends would work good to the community should be made to feel that the community in the form of the state cannot be deprived of its just share. By taxing estates heavily at death the state marks its condemnation of the selfish millionaire's unworthy life."

And in view of learned counsel's appeal to this court to consider this case from the standpoint of statesmanship and in the interest of politics we feel at liberty to cite here the statesmanlike utterance in favor of progressive inheritance tax laws of an eminent citizen, the value of whose views of public policy is not lessened by the fact that he is an honored member of this court.

Dos Passos in a note to page 1 of his work on Collateral Inheritance Taxes, quotes from a letter of Mr. Justice BREWER, as follows :

"I was not aware until such examination of the extent to which in this country the matter of taxation on successions has advanced. I have often urged the thought as one of the most just of taxes and if it were graduated in proportion to the amount of property passing I think it would be most beneficial. It would tend largely to prevent the accumulation of property in family line and to work that distribution which is for the interest of all."

Inheritance tax laws would subject to taxation a vast quantity of property that under usual conditions escape taxation.

The Hon. Mr. WINN, in an address made at Faneuil Hall, Boston, October 7, 1891, on the subject of "Taxation," quotes from a report of the Tax Committee of the Boston Executive Business Association the statement that the personal property of both city and state which under the law is subject to taxation cannot be less than twice the value of the real estate, and Mr. Winn states that

"if this is so, more than two billions of dollars escapes taxation and the people are cheated of about \$17,000,000 of taxes per annum. I understand that Mr. Robert Giffen estimates the wealth of England to be about one-sixth in land; applying this scale to Massachusetts, a sum not less than \$1,700,000,000 escapes taxation, and the loss of taxes is \$14,000,000 to \$15,000,000."

We do not vouch for the correctness of the above statement; but it may be asserted without the fear of successful contradiction that the greater portion of aggregated personal wealth throughout the entire country escapes by one device or the other its due or proportionate share of the public burden.

It has been said that "there is nothing certain but death and taxes." Though death is certain, the payment of taxes on large classes of property is more "honored in the breach than in the observance." Inheritance tax laws make taxes as certain as death.

Progressive inheritance taxes are levied extensively not only in this country, but upon the continent of Europe. In the article by Dr. West already referred to, he states that the "duties on estates of deceased persons form one of the chief sources of revenue in Australasia. The rates are progressive in most of the colonies. In Victoria the maximum is ten per cent, applying to estates of more than £100,000. * * * In South Australasia the succession

duty is graduated from one to ten per cent. according to relationship alone." By the last act of Queensland, twenty per cent. is now taken of the large amounts bequeathed to persons not related to the testator. "Tasmania has a slightly progressive tax levied upon personalty alone." The death duties imposed by the English Parliament during the ascendancy of Mr. Gladstone and the liberal party were progressive, there being an additional one per cent. tax on property amounting to £10,000. or more.

The heaviest inheritance taxes on the continent are levied in Switzerland; in Geneva distant relatives pay fifteen per cent. In six cantons the rates are progressive. When there is no will the little Canton of Uri taxes distant relatives twenty per cent. and even more on the excess above 10,000 francs. The rates in Prussia are from one to eight per cent. The French law taxes the gross value of the property; the maximum rate is eleven and one-quarter per cent. Austria, Italy, Spain, Belgium, Holland, Denmark, Norway, Russia, Poland, Roumania and Monaco all have inheritance taxes."

In Ontario estates not exceeding \$10,000. and legacies not exceeding \$200. are exempt, and direct heirs are taxable only where the whole estate exceeds \$100,000., and the rate is progressive. In Nova Scotia the exemption is \$25,000. and the rate is progressive.

Progressive rates are also levied in Quebec and Manitoba.

Dos Passos, page 26.

So that when counsel denounce progressive inheritance taxes as unusual, arbitrary and socialistic, they arraign themselves in opposition not only to the theories of a large number of economists of learning and repute, and the action of American and British-American states, but

against the matured and settled practice of the most civilized and progressive nations of Europe.

As we have before indicated, we do not make these suggestions under any apprehension that this court, in the decision of this case, will be influenced by the opinion of political essayists or the practice of foreign nations. Taxation is a practical question and of the amount and necessity of a tax, as well as of the method by which it shall be obtained, the legislature is the conclusive judge.

Mr. Pomeroy in his work on "Municipal Law" quotes Chief Justice MARSHALL as follows, on page 389 :

"However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused, but the interest, wisdom and justice of the representative body and its relations with its constituents furnish the only security against unjust and excessive taxation, as well as against unwise legislation."

And, again :

"The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of the government cannot be limited, they prescribe no limit to the exercise of this right, resting confidently on the interest of the legislature and the influence of the constituents over their representatives to guard them against its abuse."

The policy, therefore, of this tax, is not a question to be determined by this court. We do not deny the authority of this court to test the validity of this legislation by the principles of the Federal constitution, and we have attempted to show, and hope we have succeeded in showing, that this statute is not obnoxious to any of the restrictions or limitations of that instrument. With reference to the

attempt of the counsel to impose on this court the determination of a question of policy, we quote the apt statement of Mr. Attorney General Olney, in *Pollock v. Farmers Loan & Trust Co.*

“In its essence and in its last analysis it is nothing but a call upon the judicial department of the government to supplant the political in the exercise of the taxing power; to substitute its discretion for that of Congress in respect of the subjects of taxation, the plan of taxation, and all the distinctions and discriminations by which taxation is sought to be equitably adjusted to the resources and capacities of the different classes of society. Such an effort, however weightily supported, cannot, I am bound to believe, be successful. It is inevitably predestined to failure unless this court shall, for the first time in its history, overlook and overstep the bounds which separate the judicial from the legislative power—bounds, the scrupulous observance of which it has so often declared to be absolutely essential to the integrity of our constitutional system of government.”

In conclusion we submit :

1. That the Illinois inheritance tax law imposes a tax upon the privilege of inheritance or succession and not upon property.
3. That the exemptions provided therein are fair and reasonable and within the discretion of the legislature to make.
3. That the classifications made by the statute were made in the proper exercise of legislative discretion, and that the rate charged is uniform upon all who take under the same circumstances or conditions. There is no discrimination in favor of one against another of the same class and, therefore,
4. The statute is not obnoxious to the Fourteenth

Amendment to the Constitution of the United States, as it denies to no person the equal protection of the law.

Respectfully submitted,

T. A. MORAN,

EDWARD C. AKIN,

Attorney General of Illinois.

ROBERT S. ILES.

FRANK L. SHEPARD.

Of Counsel for Defendant in Error and Appellee.

APPENDIX.

The persons and amounts omitted from the operation of the inheritance tax laws in several of the states and the rate per cent. of tax in each.

NEW YORK.

Exempt: Father, mother, husband or wife, child, brother, sister, the wife or widow of a son or husband of a daughter, an adopted child or one to whom the deceased stood in the acknowledged relation of parent for at least ten years; any lineal descendant of the deceased, or any society or corporation, the property of which is exempt by law from taxation, and all estates not exceeding in value \$500.

Rate: Estates passing to all others are taxed five per cent.

PENNSYLVANIA.

Exempt: Father, mother, wife, children and lineal descendants born in lawful wedlock; wife or widow of a son.

Bequests to executors (of a fair and reasonable sum) in lieu of commission. Excess taxable.

Rate: Estates not exceeding \$1,250.
\$5 on each \$100.

MARYLAND.

Exempt: The father, mother, husband, wife, children, and lineal descendants of the decedent.

Rate: Estates not exceeding \$500.
Two and one-half per cent.

VIRGINIA.

Exempt: Lineal descendants; father, mother, husband, wife, brother, sister, nephew or niece.

Rate:

WEST VIRGINIA.

Exempt: Father, mother, wife, children, and lineal descendants of the grantor, deviser, or intestate; surviving husband.

Estates not exceeding \$1,000.

Rate:

DELAWARE.

Exempt: Father, mother, wife, children, and lineal descendants of the decedent.

Estates not exceeding \$500.

Rate:

CONNECTICUT.

Exempt: Father mother, husband; lineal descendants; adopted child; lineal descendants of any adopted child; the wife or widow of a son: the husband of a daughter of decedent.

Bequests for some charitable purpose, or purposes strictly within the state.

Brothers and sisters of decedent.

Estate not exceeding \$1,000.

Rate: Five per cent.

CALIFORNIA.

Exempt: Father, mother, husband and wife, lawful issue, brother, sister, wife or widow of a son, or husband of a daughter, or adopted child or children, lineal descendants born in lawful wedlock.

Societies, corporations, and institutions now exempt by law from taxation.

Bequests to executors or trustees in lieu of commission.

Estates not exceeding \$500.00.

Rate: \$5 on every \$100.

MAINE.

Exempt: Father, mother, husband, wife, lineal descendants, adopted child, lineal descendent of adopted child; wife or widow of a son; husband or daughter.

Bequests to executors in lieu of allowances.

Educational, charitable, or benevolent institutions in the state.

Estate not exceeding \$500.

Rate: Two and one-half per cent.

MASSACHUSETTS.

Exempt: Father, mother, husband, wife, lineal descendants, brother, sister, adopted child; lineal descendant of adopted child; wife or widow of a son; husband or a daughter of descendent.

Charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation.

Executors, compensation to.

Estates not exceeding \$10,000; bequests not exceeding \$500.

Rate: Five per cent.

NEW JERSEY.

Exempt: Father, mother, husband, wife, children; brother or sister; lineal descendants born in lawful wedlock; wife or widow of a son; husband of a daughter.

Churches, hospitals, orphan asylums, public libraries, bible and tract societies, and all religious, benevolent and charitable institutions and organizations:

Estates not exceeding \$500.00.

Rate: \$5 on every \$100.

The United States Succession Tax Law passed in 1862 was upon a graduated scale, and exempted property passing to a husband or wife, and also estates not exceeding \$1,000 in value.

The classes and rate of taxation on all others were as follows :

Lineal issue or ancestor, brother or sister, 75 cents per \$100 of value received.

Descendant of brother or sister of decedent, \$1.50 per \$100 of value received.

Brother or sister of father or mother, or lineal descendant of same, \$3 per \$100 of value received.

Brother or sister of grandfather or grandmother, and lineal descendants of same, \$4 per \$100 of value received.

All others, \$5 per \$100 of value received.

No. 425, 463^{and} 464

*Oral Arguments for D.C.
And Appellee.*
ILLINOIS INHERITANCE TAX CASES.

Supreme Court of the United States

OCTOBER TERM, 1897.

JOSEPHINE C. DRAKE ET AL., *Plaintiffs in Error,*

vs.

DANIEL H. KOCHERSPERGER, County Treasurer, Etc.

No. 425.

ELIZABETH E. SAWYER ET AL., *Plaintiffs in Error,*

vs.

SAME.

No. 463.

JESSIE N. T. MAGOUN, *Appellant,*

vs.

ILLINOIS TRUST AND SAVINGS BANK, Executor, Etc., et al.

No. 464.

ORAL ARGUMENT OF ATTORNEY GENERAL EDWARD C. AKIN AND T. A. MORAN,
ON BEHALF OF DEFENDANTS IN ERROR, IN SUPPORT OF THE CONSTITUTION-
ALITY OF THE INHERITANCE TAX LAW OF ILLINOIS.

WASHINGTON, D. C., JANUARY 28, 1898.

E. C. AKIN, *Attorney General,*
T. A. MORAN,
ROBERT S. ILES, AND
F. L. SHEPARD,

Of Counsel for Defendants in Error and Appellee.

BLEED THROUGH

POOR COPY

IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1897.

Josephine C. Drake, et al., *Plaintiffs in Error.*

vs.

Daniel H. Kochersperger, County Treasurer, Etc.

No. 425.

Elizabeth E. Sawyer, et al., *Plaintiffs in Error.*

vs.

Same.

No. 463.

Jessie N. T. Magoun, *Appellant,*

vs.

Illinois Trust and Savings Bank, Executor, Etc., et al.

No. 464.

ORAL ARGUMENT OF ATTORNEY GENERAL EDWARD C. AKIN FOR
DEFENDANTS IN ERROR, JANUARY 28, 1898.

May it please the Court:

We have determined to divide not only the time, but the subjects for discussion. The principal subjects so learnedly discussed by counsel upon the other side will be discussed by my associate.

And in order that he may have a clear field, and ample time for their due consideration, I desire to call the Court's attention to not to exceed two questions of minor importance. There is a difference between counsel for the respective parties here as to the true interpretation of this law, at least in one respect. We are agreed that this law imposes a tax upon the privilege or right of succession to the property of a decedent, and not upon the property itself; that gifts, legacies and inheritances, or the property of decedents, are for the purposes of this act divided into six classes: Those passing to near relatives or lineals; those passing to collateral relations; those passing to strangers or distant relatives, and not exceeding \$10,000 in value; those passing to strangers, exceeding \$10,000 and not exceeding \$20,000; those passing to strangers, exceeding \$20,000 and not exceeding \$50,000; and those passing to strangers which exceed \$50,000.

We are agreed that with respect to the exercise of this privilege or right of succession to these classes of property, persons may be said to be divided by this law into three classes:

First, lineals, on whom the law imposes a tax of 1 per cent., based upon the amount passing to each person in excess of the exemption.

Second, collateral relations, who are taxed 2 per cent. upon the amount passing to each person in excess of the exemption.

Thirdly, all other persons

With respect to this latter class, the rate is progressive, a higher rate being charged upon a larger amount. And the basis of computation of the amount of the tax, as well as the determination of the rate, it is contended by our opponents, is based upon the aggregate

estate of the decedent; whereas, we contend that with respect to this class, as to each of the others, the rate of the tax and the amount of the tax are to be computed upon the amount passing to each distributee.

In support of our contention, I desire to call the Court's attention to two or three provisions of this act. It is entitled, "An act to tax gifts, legacies and inheritances."

Mr. Justice White: Pardon me; what are you reading from, sir?

Mr. Akin: Pardon me; I am reading from the appendix to the brief of plaintiffs in error, wherein the law is set forth.

The law is entitled: "An act to tax gifts, legacies and inheritances." Estates, by name at least, are not among the enumerated subjects of taxation.

The second section of the law, after exempting estates for life and terms of years, and imposing a tax upon the interest passing in remainder, contains this provision:

"Provided, that the person or persons, or body politic or corporate, beneficially interested in the property chargeable with said tax, elect not to pay the same until they shall come into the actual possession or enjoyment of such property; or, in that case, such person or persons, or body politic or corporate, shall give a bond to the people of the State of Illinois in the penalty of three times the amount of the tax arising upon such estate, with such surety as the county judge may approve, conditioned for the payment of said taxes and the interest thereon, at such time or period as they or their representatives may come into the actual possession or enjoyment of said property."

This provision applies equally to persons in each of the three several classes. And we submit that the language of the law clearly shows that the interest in remainder, which is to be the basis of computation, is the interest which passes to each beneficiary. Certainly the law does not intend to say to a person who should be left an interest in remainder in a certain piece of real estate which formed a part of a decedent's estate, that if he did not desire that the tax upon that interest should be paid at once, and desired to give a bond for its future payment, he should be required to give a bond not only for the payment of the tax upon the interest in which he is beneficially interested, but a bond to secure the entire tax upon the entire class of estates and interests passing to other persons within his class.

Again, in the fourth section of this law, it is provided that:

"Any administrator, executor or trustee, having in charge or trust any legacies or property for distribution, subject to the said tax, shall deduct the tax therefrom; or if the legacy or property be not money, he shall collect a tax thereon upon the appraised value thereof from the legatee or person entitled to such property; and he shall not deliver or be compelled to deliver any specific legacy or property subject to tax to any person until he shall have collected the tax thereon. And whenever any such legacy shall be charged upon or payable out of real estate, the heir, or devisee, before paying the same, shall deduct said tax therefrom, and pay the same to the executor, administrator or trustee; and the same shall remain a charge on such real estate until paid, and the payment thereof shall be enforced by the executor, administrator or trustee, in the same manner that the payment of said legacies might be enforced."

We submit that this language clearly shows and evinces the intention of the Legislature to make the tax a charge upon the particular devisee or distributee, and the property passing to such individual devisee or distributee subject to a lien for the tax.

And, again in section 11, after providing for appraising the property of a decedent, and the return of the appraisers' report to the court, it provides:

"And from this report the said county judge shall forthwith use and fix the then cash value of all estates, annuities, and life estates or terms of years, growing out of said estate, and the tax to which the same is liable."

Here again we think the intent of the Legislature is clearly shown to require of the county judge that he determine the value of each estate passing to each legatee or beneficiary, and that he determine the amount of tax upon that particular interest. And we submit that, taking all these provisions together, it is clearly shown that the purpose of the Legislature was that the amount of the tax and the rate of the tax with respect to the third class of persons was to be computed upon the value of the estate or property passing to each person, the same as in the first and second classes.

The construction for which we contend is the one which has been adopted by the courts of the State wherein this law was enacted, whenever those courts have been called upon to administer this law. This is clearly shown in the record of the case of Elizabeth Emerson Sawyer and others against Kochersperger, one of the cases pending before this Court.

In that case an appraisement of the property was made, and the county judge fixed the value arising out of the estate of Mr. Sawyer, and the amount of tax for which each separate share or portion was liable. That is clearly set forth on page 5; and by reference to this record, the Court will see that Mr. Sawyer left five separate legacies, to five different persons, in the third class, and in different amounts, and that the county judge, in determining the value of the estates, and in determining the rate of the tax, treated each legacy separately.

Upon the legacy to Mary Louisa Turner of \$25,000 a tax of 5 per cent. is levied, it being in excess of \$20,000, and not exceeding \$50,000.

Upon the legacy to Henrietta W. Turner, the tax is levied at 4 per cent., it being in excess of \$10,000, and not exceeding \$20,000.

Upon the legacy of Addie A. Sawyer, of \$1,000, the tax is levied at the rate of 3 per cent., that being a legacy less than \$10,000. And the same is true of the legacy of \$5,000 to Mary Elizabeth Haley, and that of \$2,500 to Sarah Fairfield Johnson.

Here, in this case, the County Court of Cook county adopted and applied our construction of law; and when this case was removed to the United States Circuit Court, the judge of the Court, in confirming the action of the lower Court, adopted the same construction. And in this case we submit that even counsel for plaintiffs in error have admitted that the action of County Court was correct, and that our construction of the law is a true one. In their answer to the petition filed in that case, they say—I read from page 33 of the Record in the Sawyer case:

"And these defendants, further answering, admit that the legacy, devise or bequest to Mary Louise Turner amounts to \$25,000, and that the alleged tax thereon, under and by virtue of the provisions of said act hereinbefore referred to, amounts to 5 per cent."

And they go on and make the same admission with respect to each of the legacies to the other persons within this same class.

But it is contended that the Supreme Court of the State of Illinois has placed a different construction upon this law. And counsel, in support of their contention, on page 8 of their original brief, cite this portion of the opinion of the Supreme Court in the Drake case:

"By this act of the Legislature, six classes of property are created, heretofore absolutely unknown. It is those classes of property, depending upon the estate owned by one dying possessed thereof, which the State may regulate as to its descent, and the right to devise. * * * No person inherits property or can take by devise except by statute; and the State, having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown."

We are unable to see how that language supports the contention of our opponents, that, with respect to the third class of persons, the amount of the tax and the rate of tax are to be determined by the estate of the decedent. But the Court will note that in the center of the quotation there appear three stars, indicating that some portion of the opinion of the Court has been omitted. Naturally we would suppose that that portion of the opinion does not refer to this question. But the Court will observe, upon reference to the opinion, that the omitted portion determines the very question that is here being discussed.

The opinion of the Supreme Court is found in the record in the case of Joseph Drake and others, No. 425, beginning on page 8. The portion of the opinion which is omitted in the brief of plaintiffs in error reads as follows:

"The tax on classes thus created is absolutely uniform on the classes upon which it operates, and, under the provisions of the statute, is to be determined by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property inherited."

Now, we submit that the Supreme Court of the State of Illinois has construed this law to mean that the amount of the tax and the rate of the tax are to be computed, not upon the aggregate estate of the decedent, but upon the property passing to each person, so that each person shall pay a tax in proportion to the property by him, her or it inherited.

Taking these decisions together with the provisions of the law which we have cited, we submit to the Court that under this third classification of persons the rate of tax and the amount of the tax are to be computed upon the estate passing to each person, and not upon the aggregate of the estate of the decedent.

To illustrate the absurdity of appellant's contention, let me cite this case: Suppose an estate of \$1,000,000 is divided as follows: \$750,000 to immediate relatives, \$200,000 to collateral relatives, and \$50,000 to strangers in the third class. If the tax on these legacies to strangers is to be computed upon the aggregate of decedent's estate, the tax would be 6 per cent. upon \$1,000,000, or \$60,000. That would entirely obliterate the legacies, and would leave a tax of

\$10,000 in excess thereof, for the collection and payment of which there would be absolutely no provision in the law.

But counsel, in their reply brief, take somewhat different grounds, and they say there that what they mean to be understood as saying is, not that the tax is upon the aggregate of decedent's estate, but upon the aggregate of those portions of the estate which pass to persons of this class. They have cited illustrations here to show that one ground upon which they assail this law is that two persons may receive legacies of the same amount and be charged different prices therefor. If their contention is true then all legacies going to persons in this class of every given estate pays, not a different rate per cent., but a uniform rate. If the rate is based upon the aggregate of the portions passing to this class, then the same rate that is levied upon the aggregate of those portions is necessarily levied upon each part of such aggregate amount.

Take, for instance, the Sawyer case. The five legacies left to strangers or persons of the third class amount to \$53,500. According to their contention the tax to be levied on account of those legacies, the total amount being in excess of \$50,000, would be 6 per cent. The amount of the tax would be \$3,210, or 6 per cent. upon each one of those legacies. So that persons, instead of paying a tax according to the value of the legacy received, would in each and every case pay a uniform rate; and the person in this class who received a legacy of \$1,000 would pay 6 per cent., the same as the person who received \$25,000. Thus the very purpose of the Legislature, which they insist is evinced in this law, would be defeated and the objection which they so strenuously urge obviated.

There is but one other question to which I desire to call the attention of the Court, and that is that even if a portion of this law is unconstitutional, the whole need not and should not be held to be so. The general rule is stated by this Court in the case of *Supervisors v. Stanley* (105 U. S. 305), where the Court say:

"The general proposition must be conceded that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded."

We submit that this law treats of separate classes of property and separate classes of persons. It is enforceable with respect to each class, regardless of either or both of the others.

If the entire contention of plaintiffs in error should be sustained by this Court, then we concede that the intent of the Legislature would to such a great extent be defeated that the whole law should fall. But if the exemptions are sustained, then we submit that even if this progressive, graduated tax feature applying only to the third class is held by the Court to be unconstitutional, the balance of the law must stand, because that is entirely separable from the remainder, and because the portion of estates which passes to strangers—and they can only take by virtue of some testamentary provision and not under intestate laws—that that portion is so infinitesimally small, as compared with the whole, that it can be said to be invalid without in any material degree affecting the intention of the Legislature or the amount of revenue to be derived from the law.

I thank the Court for its attention.

ORAL ARGUMENT OF MR. T. A. MORAN, FOR DEFENDANTS IN ERROR.

May it please the Court:

The attack on the Illinois Inheritance Law proceeds upon two fundamental misconceptions; one, that the sum or bonus exacted by the State from the inheritance is a tax upon property; and the other, that the right of inheritance is a property right secured by the Constitution, and vested in children or other kin of a decedent.

If the last of these propositions is untrue, as I think we shall be able to establish, the first must go down. It will be my task to show in the time allotted to me that both of these propositions are unsound. This should be unnecessary, as perhaps never before in any court of judicature has the position been attempted to be maintained that there is a natural right of inheritance which as a property right could not be taken away by the Legislature.

There has been an evolution in the argument of my learned friends on the other side of this case. In their original brief they insinuated, rather than asserted, that inheritance was a natural and vested property right. There was no attempt made in that brief to sustain that proposition by reference to authority.

Our brief—I think we may take the credit of it—aroused opposing counsel to an appreciation of the difficulties of their position. Hence, in their reply brief they have devoted themselves to a historical discussion of early recognition by different nations of the right to inherit property, or the right to make wills, which they assert establishes inheritance as a natural right. If this assertion were not made by counsel who are learned and distinguished in their

profession, I would not presume to take the time of this Tribunal with a discussion of the question whether inheritance or the right to make a will is a natural right.

Counsel in the reply brief, in which they cite a number of writers on the history of the law, who allude sometimes in their language to the rights of inheritance as a natural right, just as Mr. Justice Brown, in the opinion quoted from in *United States v. Perkins*, alluded, in passing, to the right of inheritance, as a natural right recognized by the legislation of nations.

The right of a man to hold property and to control it without the aid of absolute law ceases at his death. Whatever interest he has in property is snuffed out, like the light of a candle, when his life passes away. He has, except under positive laws, no control of it whatever after his death. That he has the natural right to project his control of it into the future by a testament is so absurd a statement that when made every mind consciously rejects it.

Mr. Justice White: Your argument, then, goes to the length that a law may be passed saying that all property shall go to the State upon the death of anybody?

Mr. Moran: Necessarily, your Honor. There is no escape from that logical conclusion. When the distinction between rights which come to us by nature and those which are created and bestowed upon us by positive enactments is considered, such conclusion is compelled.

It is not necessary, as counsel admit, for us to establish in this case any such right in the State, for, as they say in their brief, all

that was attempted by this legislation of Illinois was mere regulation. I address myself to this proposition for the purpose only of showing that laws which permit inheritance are laws which grant privileges; that laws which permit a testator to make a will are laws which grant to him a right which he did not get by nature, and which is not inalienable.

While the learned counsel have exhibited great industry and most unusual research, they have failed to cite a single author—and they have gone back to the twilight of history itself—that has distinctly asserted that this right is a natural right. From certain propositions found in writings, they have, with considerable ingenuity, extracted certain sentences. Let me illustrate: One citation in this reply brief, under the head that “The Right of Inheritance and Testamentary Dispositions are not of Statutory Origin, and that they are Natural Rights,” is this:

“It will hardly be contended that the right of property originated in statute law. * * * Property and law are born and must die together. Before the laws there was no property. Take away the laws and all property ceases.”

That extract is taken from page 327 of Cooley’s Principles of Constitutional Law, section 2, which discusses the protection of property under the law. Turning over a few pages, the author, continuing the discussion of the same subject matter, points out a distinction which my learned friends have, either consciously or unconsciously, ignored in this case:

He shows that the test of unlawful interference with property is that vested rights are abridged or taken away. Rights are vested in

contra-distinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person as a present interest. They are expectant when they depend upon the continued existence of a present condition of things until the happening of some future event.

Then he goes on to say:

"The rules of descent may be changed in the legislative discretion, though thereby the expectations of living persons under the previous laws are disappointed. The living have no heirs, and the laws which provide who shall be their heirs in the event of their death are only expressive of the present views of what is best, and may be changed as these views change, and no vested rights can be impaired, since no rights under these laws can vest while the owner of the estate is living."

That passage alone would be sufficient, if it is to be taken as authoritative, to answer the entire contention of the distinguished counsel who preceded me. Maine on Ancient Law, page 175, shows that right to make a will is not a natural right.

The proposition is one upon which all authorities agree. The doctrine is nowhere more intelligently stated than by the Supreme Court of Illinois. In the case of *Sturgis v. Ewing*, in 18 Ill., Mr. Justice Caton, one of the ablest judges who ever sat upon the bench in our State, discussed this question, and I will read what he says as it appears on page 26 of our brief:

"Can there be a doubt that the right to devise is a subject entirely within the control of the Legislature? The power to devise is not

an inherited natural right, conferred upon us by the law of nature, as is the right to acquire and own."

There is the distinction that my learned friend missed.

"So long as we can not possess, control, or enjoy anything we have, after we are dead, we can have no absolute right to say what shall be done with our acquisitions after that period. As mortals we then cease to be, and all connection with earth and our acquisitions terminate. * * * Depending alone upon the law of nature our estates would become the property of the first who should seize them as they fell from our hands. The power to control the disposition of our possessions after our demise is conferred by municipal laws, and is purely a subject of municipal regulation. It is not a part of the right of property itself, but it is only an incident to it, as the law for the time being makes it so. Without this power our title may be complete and absolute. By devising our property we do not lessen or impair in the least degree our title to the property devised. We may change the devise, or alienate it at pleasure at any time during our lives, and until our demise the devisee acquires no sort of right or title to it. When we acquire property we do not acquire with it, as part of it, the right to devise it in any particular mode, or even to devise it at all. The objections urged to this law involves the proposition that whoever acquires property acquires with it the right to divest it according to the law as it then exists."

The learned Judge then goes on to discuss the other phase, that is, the right of inheritance, saying that both of these rights are the creatures of the Legislature, and only exist because the Legislature creates them by positive law.

In another case in our Supreme Court, reported in 3 Scammon, it was said:

"The Legislature may so change the law of descents as to cut off all our expectations of inheritance, and confer it upon a single child, and may deny the power of disposition by will so as to prevent the bounty of our parents."

Language substantially equivalent to that has been used by every court in this country that has been called upon to discuss this question, and has been used by this Court, so that our learned friends do not enjoy the privilege of discussing here a question that is open in this tribunal.

Mr. Justice Harlan: What you have read from Judge Caton does not conflict with the idea that a man may in his lifetime make a disposition of his property that will take effect upon his death.

Mr. Moran: Perhaps it may, your Honor. I was about to come to that. I will content myself now with the proposition that every Court has been called upon to consider this question, and every author that has written upon it has declared that it is the creature of municipal law; that it exists only by the will of the Legislature; and that it can have no other existence; that the grant of the right to make a will, or the right to devise is the creation of a privilege that does not exist before the act granting it is passed. How can it be otherwise? Our own Supreme Court in this very case says we have by our statutes repealed the Common Law and the Statute of Descent of England, enacted prior to the fourth year of James the 1st. That being the condition of things, how are you going to inherit?

What law is it that fixes the terms of the conditions of title to property of a decedent unless you find it in a statute?

The Common Law repealed, the English Statute of Descents repealed, if no statute of Illinois devolved the estate to persons described therein, or authorized the owner thereof to direct its devolution by testament, is not the conclusion forced that property on the death of an owner would return to the State, from which it is in theory originally derived? It is not thinkable, not conceivable, that property of any kind can descend, or be transmitted by testament in the absence of positive law, creating the privilege of receiving it on the one hand or of transmitting it on the other.

Why, if your Honors please, it is an abuse of the time of this tribunal to undertake to argue here that the right of inheritance is a natural right or a property right protected by constitutions, and not absolutely and entirely and without limit at the disposal of the Legislature. There is no basis for such an argument, no foundation for it, either in history or in law. Such a proposition is as baseless as the fabric of a vision, as completely without substantial foundation as a castle in the air.

Well, if your Honors please, this proposition does not interfere with the right of a party to dispose of his property during life. The right to dispose of property is an incident of property. It is connected with it; it is controlled by law; it is a vested right, and it can not be interfered with without violating the provisions of the Constitution. The Legislature can not confiscate my property or any portion of my property. It is protected by the Constitution as a vested right. The Legislature could not prevent the making of a

gift *inter vivos*, because such a gift is a contract and it is a necessary incident of property that one may dispose of it or acquire it by contract, and such a right is not only a liberty, but is a property right, which is vested, and is therefore within the protection of the Constitution. Such a disposal of property is not testamentary in character, and is to be distinguished from a gift *causa mortis*, or other attempted disposal or conveyance made in contemplation of death, and which is to take effect in possession only after death. This latter class of transfers is affected by the Illinois statute, and such conveyances have always been treated as essentially different in character from transfers *inter vivos*, and if interests passing by such deeds or gifts could not be subjected to bonus conditions, it is very apparent that an inheritance tax law, however unobjectionable in other respects, could not be made effective, for it would easily be evaded by gifts *causa mortis*, or by grants to take effect in enjoyment upon the death of the grantor.

When the Legislature attempts to deal with my property rights, it is bound to respect them as vested, but when the Legislature comes to extend to me a privilege, it can extend it to me under such conditions as it sees fit; and when it imposes a condition that there shall be paid, or be taken, a portion of the bequest or devise to me for the benefit of the State, it is not exercising the power of taxation upon property.

So that the question insinuated by the learned gentleman who preceded me, that the Legislature could not reduce a man's property to a life estate, has no pertinence to the argument. Suppose a man has a piece of real estate; he has a right to sell that during his life, has he not? It is a fee. It passes as a fee forever. He may dis-

pose of it by sale or by gift *inter vivos*. This statute in no manner affects the quantity of the estate that one takes or one grants. Counsel thought he was putting a perplexing question when he asked if legislatures might repeal laws with reference to transferring property; that is, laws declaring how the passing of title should be evidenced. Well, if your Honors please, what necessity is there for a deed? Suppose one of your Honors wishes to invest me with your estate. Put me in possession of it, and I need no deed. You want to invest me with your personal property. By gift *inter vivos* put me in possession of it, I have a good title against the whole world. Transfer of property *inter vivos* needs not the aid of statutory law. The statutes with reference to the transfer of real estate and personal property are purely matters of convenience; wise and just and good, but purely matters of convenience; and subject, as counsel say, to change and regulation by the Legislature. When the Legislature should undertake to say that I should not pass my property by gift *inter vivos*—that I should not acquire property by contract during life—then would the limitations of the Constitution come in and restrain the law.

Mr. Justice Harlan: Could the Legislature prescribe that all gifts of personal property should be in writing and recorded?

Mr. Moran: Yes, they could, as between certain persons. They have done it in our state as between certain persons. But that would be a mere regulation, and only for the benefit of creditors.

Mr. Justice Harlan: Could the Legislature say that no title to property shall pass to anyone except by a written instrument put on record?

Mr. Moran: Possibly. Possibly the Legislature might have control of the question of making evidence of title. What I say is that it is mere regulation. The Legislature might prescribe that title should pass in a certain way, but the Legislature could not prescribe that the property should be taken or that it should not be subject to incidents of sale and delivery in some way.

I will assume that the first contention on which the attack on this law depends is sufficiently answered. Cases sustaining our position are abundantly cited in our brief. No case can be found that holds the contrary. Hence, when the learned and distinguished counsel who is to follow me asked for an extension of time beyond that which the rules of this Court allow for oral discussion, in sympathy for him, knowing what he had undertaken to maintain, I was perfectly willing that he should have the time, for I was perfectly conscious that he needed it.

Now, if your Honors please, I come to the next proposition. If this is a privilege granted; if, as numbers of these cases have said, and as Mr. Justice Brown wrote in *U. S. v. Perkins*, the State could take all, could deny the bequest entirely, it may impose such conditions on the grant of this privilege as it may in its discretion deem proper.

In the cases that have been decided—for this question is comparatively a new one—much has been said inadvertently by the Courts. For instance, this right of the State to take a bonus or price for the privilege of inheritance has been denominated a tax. Well, we are in the habit of using the shortest word, and in one sense whatever is exacted for public use may be a tax. But the word "tax" used in the

decisions, in nearly all cases, as appears from the opinions themselves, is distinguished by learned judges who use it. It is said in many of the cases, that this imposition on inheritance is not a tax in the sense in which we speak of a tax upon property, and hence it is not an exercise of the taxing power. But the very courts that make that distinction fall into another mistake. They say it is like an excise; that it is like a tax imposed upon occupation; and that it is to be compared to that power which in levying such tax is exercised by the State. A moment's reflection will show that such comparison is incorrect. An occupation is *not created* by the State. Take a shoemaker: He learns his trade; he qualifies himself by a period of apprenticeship to exercise that calling; he does not get that right from the State; he selects his occupation and is free to do so, and such calling is not created by the State. But the State comes and says: You may exercise that calling by paying a certain tax, a certain excise; you may be licensed to work at that trade upon the payment of a certain sum. Does the State in doing this create the occupation, or does it restrain the exercise of the occupation that is already existing? It is manifestly a different thing to apply an occupation tax or a capitation tax, from applying or requiring the payment of a bonus or price upon the grant of a privilege. Then such instances, though they have been used in opinions to illustrate the exercise of this power by the Legislature, are not apt, because in the very nature of things an occupation is different from a privilege. When a State imposes a license tax upon an occupation it does not grant a privilege; it restrains the exercise of the occupation, which could be enjoyed without the aid of the law; it is the difference between preventing and creating; the difference between imposing a burden upon that which already exists, and creat-

ing originally and offering to one a privilege accompanied by conditions which if he may take it he must comply with.

Conferring on a citizen the privilege of inheritance is more like the grant of a franchise to a corporation than anything else. The cases, in my opinion, that discuss the right of the State to impose upon a corporation a bonus upon the taking of corporate rights are illustrative of the rule that must apply in such cases as the one now before the Court.

The right to be a corporation is, as has been said by this Court, a valuable right. Mr. Justice Field says, in *Home Ins. Co. v. New York*, that the right to be a corporation is a right of great value. It can only be granted by the State. Such privilege is the act of a creative statute. Congress has a right to incorporate a company when the object of the company is to accomplish something within federal dominion. There is in the Constitution no grant of express power to Congress to create corporations. It is merely an incidental power of government. It may be exercised by special laws incorporating particular corporations, as was done in chartering the different Pacific railroads, or by general laws, as in the case of national bank charters.

The states, generally, now have constitutional provisions requiring corporations to be organized under general laws. In Illinois the Legislature is prohibited from granting special charters now; but as Mr. Chief Justice Fuller will very well recollect, up to the adoption of the Constitution of 1870 special charters might be granted in Illinois. Now suppose the State is applied to where there is no constitutional inhibition against special charters by certain corporators

for the privilege of organizing a corporate body, the privilege of being a corporation, the State may pass an act authorizing the persons named and their associates to be a body corporate, with power to sue and be sued, etc., to engage in the grocery business, or to engage in the manufacture of iron, and the State may say to these corporators: You may take this power to be a corporation, with a capital of \$10,000, and for that you shall pay into the State treasury, \$500. That is a special charter, a special privilege, granted by the State upon a special condition imposed by the State, and if the corporators do not want the charter they need not take it. As the Court of Appeals of New York said, if they take the boon they must accept the burden. Another set of corporators may come the next day and ask the Legislature for a special charter, for identically the same powers, with identically the same capital, to do identically the same thing. Is the Legislature bound to let them have a charter at the same price? Does the Legislature deny the equal protection of the laws by imposing upon the second set different conditions and a different bonus? Can the one set say, You granted the privilege to those other people for \$500; why impose \$1,000 upon us? The Legislature might grant the special charter to one set of people for nothing, to another set of people for a certain sum, and to still a third set for an entirely different sum. There need be no proportion between the sums, no ratatability between the bonus required from one and that imposed on the other. If that is so, may not the Legislature accomplish the same results by a general law, making a classification of corporations? May it not impose upon corporations organizing with a capital of \$10,000 one sum, and upon organizations organizing with a capital of \$100,000 another? And may it take amount of capitalization as the point which shall distinguish between the two classes?

Capital is not value; amount of capital is no indication of what the right to be a corporation is worth. It is not the question of value, but amount of capital is the line or mark that the Legislature arbitrarily sees fit to select on which the classification is made for the purpose of exacting the bonus.

This Court has had these questions before it: has determined them. In 127 U. S., *California v. The Central Pacific Railway Co.*, Mr. Justice Bradley, in delivering the opinion of the Court, speaking of the right to impose what was there said to be a tax upon the franchise of the corporation, said:

"It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be \$10,000 or \$1,000,000, as the Legislature may choose, or without valuation of franchise at all, and tax may be arbitrarily laid."

That is the rule that governs the granting of a franchise. The grant of a franchise is a privilege. I have defined a privilege thus:

"A privilege is a right or franchise created by a legislative grant, conferring some power or right or duty upon a citizen, and which no citizen or individual can exercise or avail of without the authority of the statute—a law which confers upon some one or more individuals the right or authority to take, do, or enjoy some particular thing which, without the authority of the statute they could not take, do, or enjoy."

The learned counsel in their reply brief, after following a course of reasoning that is not quite intelligible to me, and after two chapters in which they undertake to demonstrate that inheritance is a natural right, and that the right of testamentary disposal is a

natural right, acknowledge that one of these natural rights may be superior to the other; and they say, as a conclusion of this discussion:

"The Legislature may exclude altogether the right of inheritance; but this it may only do by the fullest recognition of the testamentary right. It can not exclude the natural right of inheritance by according rights of inheritance to persons who have no natural right to inherit; nor can it deny the right of inheritance when the testamentary right has not been exercised."

What do you do with illegitimates? There has never been a nation in the world where the illegitimate has been regarded as having any *natural right* at all. By the common law he is *nullius filius*. He has neither father, nor mother, brother nor sister. Can not the State give to this person who has, according to the law of all civilized nations, no natural right whatever, the right of inheritance as against children born in lawful wedlock? Can it not do it by special legislation, if your Honors please? We know that many of the states have systems of legitimation. In Louisiana, I believe, there is some proceedings before a notary, the particular details of which I do not know. In other states statutes have been passed recognizing the rights of illegitimates, or rather, giving rights to illegitimates. Such statutes have been passed in Arkansas, Georgia, North Carolina, Virginia and in Maryland. Mr. Justice Woodward said that in Pennsylvania the illegitimate may be made capable of inheriting, as Blackstone says, by the transcendent power of an act of Parliament, and not otherwise, as was done in the case of John of Gaunt's illegitimate children by Statute Richard II. "We have," says the learned Judge, "on our statute book acts of legitimation without

number." By that he means acts of special legitimation of particular illegitimates by name. In Georgia several persons, four or five, were legitimated by one act by name, giving them inheritable blood.

Judge Woodward said in the case alluded to:

"Because our Constitution is silent on the subject, the legislative power is plenary. I am not aware that it has ever been questioned. An estate that has already descended to the legal heir can not be divested; but that the taint of blood may be cured for purposes of future inheritance, by the healing touch of the Legislature, is not to be doubted."

Killam v. Killam, 39 Penn. St., p. 123.

In McGunnigle v. McKee, 77 Penn St., Judge Mercer said:

"The legislative power may remove the legal taint of blood, either by general or special law. For this purpose the power is most ample. The most striking case of legislative power to legitimate bastard children is shown in the case of Brewer v. Blougher, 14 Pet., 178. The Supreme Court of the United States there held a general law of the State of Maryland declaring illegitimate children capable of inheriting from their mother to extend to those begotten in incestuous connection."

In Brewer v. Blougher, Mr. Justice Taney said:

"The expediency and moral tendency of this new law of inheritance is a question for the Legislature of Maryland and not for this Court."

In Steven's Heirs v. Sullivan, 5 Wheat., 207, in the opinion of this Court, a law of Virginia was interpreted as making the illegiti-

mate children of a mother *quasi*-legitimate, but leaving them in other respects without father, brothers or sisters. In a learned note to the case, it is stated that the Emperor Valentinian permitted the illegitimate children of fathers who had also legitimate offspring to acquire by will one-twelfth part of the paternal property, and in case the father had no legitimate children or surviving parents he might dispose in the same manner of one-fourth of his estate in favor of his illegitimate children. And by the Code Napoleon, illegitimate children, legally recognized as such, are entitled, in case their father shall have left legitimate descendants, to one-third of the portion to which they would have been entitled had they been legitimate. And in case the former shall have left no descendants, but only kindred in the ascending line, or brothers or sisters, to a moiety of the same, and in case the parents shall have left neither descendants nor kindred in the ascending line, nor brothers or sisters, to three-fourths of the same portion.

It is very clear, therefore, that it has always been the law that legitimates might be fully or in part rendered worthy of inheritance. The Legislature may invest an illegitimate with the privilege of inheriting an estate of his deceased natural parent to the extent of \$10,000 or \$20,000, and upon the granting of this privilege it may impose the condition that he shall pay out of the estate which he is thus empowered to take, any sum which the Legislature may in its discretion see fit to exact, and an act empowering one illegitimate by name to inherit one sum in no manner restrains the Legislature from passing an act authorizing another illegitimate to inherit a different sum, or the same sum, and to require from the privilege granted to this second illegitimate a different sum to be paid into the treasury

of the State. If the Legislature can do this by single special acts, it may do the same thing with reference to two or three specific individuals in the same act, and may impose upon the privileges granted to these individuals respectively conditions and exact from them different sums, larger or smaller, as the Legislature may determine, as the condition of their availing of the privilege extended to them. If this can be done what principle of constitutional law inhibits the Legislature, from, by a general act, granting to illegitimates privileges of inheritance or privileges of taking by bequest and imposing as conditions of the exercise of the privilege different bonuses or exactions upon such class according to the sum or amount which each one inherits or receives. And what rule is there that requires the Legislature to make the rate proportionate to each one or prevents the Legislature from in the same act providing that illegitimates may take an inheritance of one amount, without paying any duty or bequest thereon whatever, and providing that illegitimates who take other and different amounts shall pay for the privilege such specific sums as the Legislature determines shall be paid, or prevents these sums from being arbitrary or disproportional and imposed without regard to any rate whatever as to the value of the actual inheritances taken by the class?

Unless learned counsel can bring to the attention of this Court some constitutional principle that will control such legislation, they must fail in their contention in the case at bar. There is no such principle, for the reason that the granting of privileges upon bonuses or imposts, or the exactions of sums by the State is wholly different in its nature from the levying of taxes upon property, and it is not

and can not be in any manner subject to the same restraints and controls that are provided by the Constitution to guide the levy of such a tax.

When you speak of lineals you mean descendants born in lawful wedlock. Here is a stranger taken by the State, a stranger in law, a person without any ancestor; and by the fiat of the Legislature he is made co-heir with the child born in lawful wedlock. If there is but one child born in lawful wedlock, this illegitimate child, this child of the bondwoman, is by the fiat of the Legislature made co-heir with the child of the free woman.

Chancellor Kent says that it is the law of universal civilized society that when an estate is without lawful heirs entitled to it, it escheats to the State. The doctrine that it is in the power of the State to create conditions which will leave none but itself to take the property of a decedent is too old to have applied to it the opprobrious epithet of socialism. The exercise of this power would be the exercise of a power that this Court has said resides in every sovereignty.

My learned friend has referred to the Ordinance of 1787. We referred to it in our brief to show what the policy of the law was in this country. He cites it for a different purpose. He says that it declared a rule of inheritance, a rule of testation. So it did. By that ordinance the nation provided by legislation the rule of inheritance and testation in the territory of the Northwest. But it did more. It recognized this right in the State of Illinois that I am here contending for. It declared that

"This law relative to descents and dower shall remain in full force until altered by the Legislature of the district, and until the Governor and Judges shall adopt laws as hereinafter mentioned, estates in said territory may be devised or bequeathed by wills in writing signed and sealed by him or her," etc.

This national legislation recognized the right of State legislation to change in the Northwest Territory the law of descent and of wills. When Illinois came into the Union she reserved to herself and to her people the right to legislate with reference to the descent of property, and the disposition of property by will in that State. That right she did not give up when she consented to the adoption of the Fourteenth Amendment.

The Fourteenth Amendment, as this Court has shown, relates to taxation of property. The exacting of an amount as a bonus or price for a privilege, as this Court has determined, is not the power of taxing property. Speaking about this power to impose these exactions the Supreme Court of Maine distinguishes aptly:

"An excise tax upon the value of property so allowed to be received by the collateral of the strangers to the blood leaves him in much better condition than an absolute withdrawal of the privilege would. He can not complain of unjust taxation when the State allows him to take property subject to a duty of $2\frac{1}{2}$ per cent. when the State has the right to exclude him from the whole."

And further, the Court said:

"There is no given sum to be assessed in which the privilege is fixed by valuation, but the percentage is fixed by law, leaving the

amount to be ascertained by valuation. The value of the property is resorted to to measure the amount of the excise."

And the Supreme Court of Massachusetts says in *Minot v. Winthrop*:

"Taxes on legacies and inheritances or on successions in any form to property on the death of the owner have generally been considered not as taxes upon property, but as excises upon the privileges of taking or transmitting property in this way."

And as to exemptions, it says:

"With reference to the exemption, it is within the peculiar jurisdiction or discretion of the Legislature to determine what exemption should be made in apportioning the burdens of taxation among those who can best bear them."

And that brings me to the discussion of this question of exemption, because, notwithstanding all the argument of my learned friend, he comes in the end to the admission that the State may regulate the right of inheritance and of making a will; and he admits that the Legislature may make an exemption. But he says it must be a reasonable exemption. Well, if your Honors please, who is going to determine whether it is a reasonable exemption or not? What rule has been fixed or announced? Where is the rule found which determines what is a reasonable exemption when the Legislature has the acknowledged right to exempt? Counsel have persistently avoided stating in their brief any rule which will govern either this Tribunal or the Legislature. Granted the right to exempt, who shall determine its reasonableness? When you talk about exempting privileges from taxation, what rule of the Constitution can you

specify that will guide the mind of any man or set of men in fixing the amount that shall be exempted and allowed to be taken without the imposition of a bonus? My learned friend must state the rule to this Court. That rule which will control the Legislature in the exercise of that discretion must be made to appear as definite to the judicial eye as material substance is to the touch. The rule must be ascertained, stated, defined. It can not be left ambiguous, uncertain. The idea can not be left to float "undefined upon a gorgeous haze of words."

If your Honors please, the Legislature of Illinois admittedly have the right to exempt. Then they have and without control the right to determine what is reasonable exemption. Who shall say for the sovereignty of Illinois what shall be a reasonable exemption of estates passing from decedents within the borders of that State? What power or authority shall do it? I have perfect confidence in the wisdom and judgment of this august tribunal, but still I prefer, upon the question of what is a reasonable exemption, the determination of the Legislature of Illinois. Why? Because the institutions of my country forbid me to ask from this Court the exercise of a discretion, or the review of a discretion, and deny to the Court the authority to limit a discretion that the constitution has reposed without control in the Legislature of Illinois.

It is said that \$20,000 is too much. How does counsel know that \$20,000 is too much to be exempted in Illinois to lineals? But he says you must not exempt an estate so that a poor man might enjoy the privilege untaxed. To do that would be spoliation, socialism. The Legislature of Illinois is the only body that is authorized by law to determine what exemptions are most wise and just for the inter-

ests of the inhabitants of our State. That body knows the condition of our people.

If your Honors enter upon the discussion of what is a reasonable exemption of a legacy in our community, you want other and more information than you now have.

[] You are invited here to exercise a power that you have constantly repudiated. Authorities are cited here with reference to exemptions of *property* from taxation. When you come to tax property, you are taxing that which is a vested right in the owner. The laws of uniformity and equality apply. Authorities that relate to the taxation of property have no application, no pertinency to the question here presented, and you can work out no logical rule from them by which to decide it. It is said that the Legislature must find classes—not make them. But you can not find exemptions. They must be declared, and, as we have seen, arbitrarily declared in the same manner as the jurisdiction of courts, and the right of appeal and similar rights and privileges are determined by the exercise of legislative judgment.

They say, you can not classify by amounts. Well, the power to classify by amount, to discriminate arbitrarily by amount fixed by the Legislature, and declared without any control has always existed and always must be exercised in legislation so long as we remain a free people. Classification by amount! Why, if your Honors please, the Congress of the United States has classified the right of suitors to go into the United States Courts by amount. Suppose my learned friend has a note for \$1,500; that I have a note for \$2,500; that citizenship is as required by law; that the questions arising on the

notes are identical; the rights which he desires to have protected by the decision of this Tribunal or by a circuit court of the United States are precisely identical with the rights I want to have adjudicated. Still Congress has distinguished between us upon the arbitrary amount of \$2,000, and while I can get in, he is kept out. Can your Honors control that arbitrary discretion? Can you tell why the amount was not \$5,000, why it was not \$10,000 why it was not \$1,000? Why was it increased from the original \$500?

Courts can not tell because Courts do not know. Courts were not organized for that purpose. Courts have no such power.

The right of appeal is a privilege, though it might well be said to be a right. Yet in many of the States of the Union the right to have the adverse judgment of the trial reviewed is denied in one case and permitted in the other, upon a discrimination or distinction that depends wholly on amount, an arbitrary amount, not arrived at by any rule that can be stated or arrived at by reasoning. The uncontrolled and uncontrollable discretion of the Legislature fixes it, and the Courts are bound by the distinction, as declared.

So I might go through innumerable illustrations. Take the difference between grand and petit larceny. A man steals my pocketbook, but does not know what it contains when he steals it. In our State, if it turns out to contain \$15, he goes to the county jail—is well fed—and in a brief period comes back into the community with no stain of felony upon him. If the pocketbook contains \$15.10 he goes to the penitentiary; he is a felon branded and disgraced forever. What is the distinction? Amount. It is broader than that in some cases. It is \$15 in Illinois. Why is it \$15? Can you say of two

thieves, the moral qualities of whose acts are precisely the same, the one punished by temporary confinement in the local jail, the other committed to the penitentiary and branded as a felon, that there is a denial of equal protection of the laws? The discrimination is wholly and entirely and only upon the question of amount.

In California the difference in punishment was greater. A man was judicially hanged in California for stealing property worth \$400, because the Legislature had determined that for grand larceny the jury might inflict capital punishment. The distinction as to amount was the distinction that sent that man to the gallows, whereas a man who committed as great a sin against society, as great an infraction of the commandments of Almighty God, would only be subjected to suffer temporary imprisonment or fine.

Not discriminate as to amount! Why, it is the most usual ground of discrimination. Arbitrary? My learned friend couples the words arbitrary and unreasonable. Whenever a Legislature comes to exempt, it must exempt arbitrarily; must it not? How else can it exempt? Massachusetts exempts \$10,000. How does the Legislature arrive at \$10,000 as the right amount to be exempt? Can the Massachusetts Court tell? Can your Honors tell? Can learned counsel suggest a rule or a distinction which will lead any Legislature to go right on this subject, and to do that which my friend says is reasonable? No. Because it is the uncontrollable discretion of the Legislature. And, as this Court has said in repeated cases, it is not to be presumed that the Legislature will do wrong on the subject.

Mr. Justice Harlan: Would your argument lead you to maintain the power of the Legislature to adopt this principle in ordinary taxation laws?

Mr. Moran: No, sir. I distinguish. But that is the difficulty with my learned friends on the other side. They do not distinguish. In states where exemption from tax on property is allowed, how are you going to fix what is a reasonable amount? I admit that there may be such an outrageous exemption on the part of the Legislature as points to an intention not to exempt fairly, but to reach some other ulterior purpose. That of course would be condemned. But how is this Court going to say that \$20,000 exemption of the privilege of inheritance in Illinois is unreasonable, that \$10,000 in Massachusetts is reasonable, or to say that the Massachusetts exemption is reasonable and the \$7,500 exemption in Montana is unreasonable, or the \$1,000 in Maryland, or \$500 in California, or that \$10,000 in New York is reasonable, or unreasonable? Will my learned and distinguished friend point out to this Court a rule that will determine the reasonableness of these exemptions, and put some of them on the one side of it, and some on the other? These exemptions are reached by the exercise of discretion in the Legislature under an official responsibility. They are not made for ulterior purposes. There is no ulterior design. The Legislature is acting under the warrant of its authority for the benefit of the community that it represents. It exercises its judgment. If it makes a mistake the next Legislature will correct it. There, as Chief Justice Marshall said, is the correction for that sort of legislation, and not in the Federal Tribunal.

Mr. Justice Harlan: I intended to ask you as to the power of the State to apportion one rate of taxation upon one kind of property and a higher rate upon other property.

Mr. Moran: If your Honor please, this bonus is not apportioned upon property at all. That is the distinction. It is the privilege or right to receive a specific legacy that is taxed.

Mr. Justice Harlan: I am not talking about legacies. I want to get at your opinion on this question, as to the power of the State to place an ordinary tax upon property, say up to \$10,000 and its power, if it is worth more than \$10,000 and under \$20,000, to tax it at a higher rate.

Mr. Moran: We have no such rule in our State. No property can be exempted from taxation with us unless used for religious or charitable purposes. I have not examined cases with reference to that question, with a view to discussing it.

Mr. Justice Harlan: I wanted to see the extent to which your argument would lead you.

Mr. Moran: My argument does not apply to the right to exempt *property* from taxation. It may to a certain extent but I am not making the argument for that purpose. This Court can not decide this case on any such ground as that. My argument applies to the question of exemption of privileges.

Here is an exemption of \$20,000 to lineals. They could exempt it all. Why is \$20,000 too much? Chief Justice Taney said that in the case where the lineals were exempted together, and the tax was put upon the collaterals, it was all right, and that there was no

reason for interfering with the law, because there was an exemption of the lineals; that it did not make against the law at all. So, when you come to the collaterals, how are you going to say that \$2,000 exemption to collaterals is unreasonable? On what do you proceed? Where is the plank on which you walk that leads to that conclusion? And what is the premise from which you start that authorizes you to go there? It does not exist. It is to be found neither in positive expression of authorities, nor in the reasonable conclusion to be drawn from admitted principles.

My learned friend admitted that there was a power of exemption. If you admit that there is a power of exemption, you give up the argument that you can not graduate a tax. Do you not graduate the moment that you exempt one sum and impose some tax on another? Is not that graduation? Take the case I have supposed in the brief—exemption of \$1,000, imposition of tax of three per cent. on a legacy above \$1,000 and less than \$2,000, imposition of a tax of six per cent. upon a legacy of \$2,000 and not exceeding \$3,000. Is there a greater difference between no tax and three per cent. than there is between three per cent. and six per cent.? Is not the charge of six per cent. on one amount and three per cent. on another the exercise of identically the same power as charging nothing on one amount and three per cent. on another? Why may you not say to a man who receives a legacy of \$50,000, "You shall pay upon this legacy \$3,000?" Is it assessed upon the property? No. It is assessed upon the privilege.

Let us again consider the power as exercised by a Special Act. Suppose that there is no law in a State authorizing testamentary disposition; a man applies to the Legislature and asks a Special Act

authorizing him to receive a bequest of \$50,000, and the Legislature passes a law authorizing him to receive from a specified person a legacy of \$50,000. May not the Legislature say: Having granted you this privilege, you shall pay into the State treasury the sum of \$3,000? You must answer yes. Then a man comes who wants the privilege of receiving a legacy of \$10,000. May not the Legislature say to him: You may have this right, this privilege, upon your paying into the treasury of the State \$300? May it not fix the bonus at \$50? By what rule do you say that either of those two men is denied the equal protection of the laws?

If this can be done by Special Act, where there is no limitation on the Legislature to pass a Special Act, can not that body pass a law classifying these two persons with reference to their privileges, and say such persons as enjoy under this law the privilege of receiving bequests or devises of the value of \$50,000 shall pay for that privilege \$3,000, and those who shall receive only \$10,000 shall pay for that privilege some specific sum. Why is there to be any ratability between the two? Why is there to be any uniformity or equality between the two—I mean as a matter of the exercise of the Constitutional power?

When you come to say that wise legislation will apportion such charges this way or that way, you are entering upon the realm of statesmanship into which the learned counsel has in his brief invited this Court to travel.

When you come to say that the Legislature can not put a progressive tax or a progressive set of bonuses upon privileges granted, classifying, and putting the same rate upon the same class, the distinc-

tion as to class being founded on amount, you are denying that in granting these privileges the Legislature may estimate the ability of the party to pay by the value of the gift which the Legislature holds out to him. There will be no warrant found in the law, or in the decisions for the exercise of any such discretion or control in this Court as that.

As I said before, this law passed by the Legislature of Illinois was declared constitutional by the Supreme Court of Illinois. That declaration, so far as the Constitution of Illinois is concerned, is binding upon this Court. The only inquiry here is, does this law violate the provisions of the Fourteenth Amendment? You have said that the Fourteenth Amendment protects from unequal taxation, but you have also said that the Fourteenth Amendment does not control the State in imposing conditions or impositions or bonuses upon privileges granted.

Bonus is the correct word to use as has been aptly determined by this Court, with reference to these privileges. In 3 Howard, in the case of *Gordon's Appeal v. The Tax Court*, Mr. Justice Wayne, speaking about the charge made for a franchise, says:

"A round sum or an annual charge, with or without reference to the capital stock, may be asked by a Legislature for such a franchise. It may be more convenient for the banks to have such a consideration or bonus distributed through the years of their corporate existence than to pay its equivalent in advance."

And in 16 Wallace, Mr. Justice Hunt adopts the definition of bonus given by Webster in an opinion of the case of *Kennicott v.*

The Supervisors. In a portion of the opinion on page 475, the Court says, speaking of the definition of this word:

"It is thus defined by Webster: 'A premium given for a loan or charter, or other privilege granted to a company as, The bank paid a bonus for its charter.'"

In 21 Wallace, Mr. Justice Bradley, in the case of *The Railroad vs. Maryland*, in speaking about the discretion that the State might exercise to impose upon a railroad a charge for the privilege granted, said:

"It has a discretion as to the amount of that compensation. That discretion is legislative, a sovereign discretion, and in its very nature is unrestricted and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility to the public of those who, for the time being, are officially invested with it. In this respect it is like all other legislative power when not controlled by constitutional provision; and the Courts can not presume that it will be exercised detrimentally."

Then these charges are bequests and devises are bonuses, and an inheritance tax is imposed upon different inheritances coming within classes distinguished from each other by fixed amounts, and the Legislature is not bound to put a ratable imposition upon one class as compared with another. The Legislature is free to select the objects of its bounty. It may allow one class of inheritances, one class of bequests, one class of devises, to pass to the persons who take them without the imposition of any tax at all. It is the free grace of the Legislature. It may classify others, so that for \$20,000

legacies or legacies in excess thereof, a certain rate shall be paid. It may classify by distinction in kin, and it may re-classify these classes, by distinction as to amount.

My learned friends say the Legislature can not classify by distinction as to amount as between strangers. Why not? Strangers have no rights, not even the flimsy, so-called natural rights that counsel have been so vigorously claiming for kindred. Why can not the Legislature say: We will permit legacies to strangers, and we will classify the legacies according to amounts; we will tax one amount at one rate, and another amount at another rate? Your answer must be: Yes, unless the power to tax property is confused with the power of the Legislature to prescribe its own conditions for the privileges that it grants by way of franchise or by way of inheritance, or by way of testamentary capacity.

In the cases cited in our brief, there will be found apt illustration. Mr. Schouler, in his work on Wills, says there are two wills: There is the Will of the State, expressed in its Statute of Descents; and there is the Will of the testator, which he is permitted by law to make. The will of the State may limit the testator's testamentary power. As one of your Honors suggested, he might be denied permission to will away from his children more than one half of his property, so the State might direct that he should not be permitted to will anything at all. The will of the State is supreme. The State writes out its will. It is known to all men. The testator may adopt the State's will, and let his property go under it if he sees fit. Where the testamentary right is given, the testator may exercise that right within his discretion, but all because he is authorized by the State to do so, it is a privilege which the State permits him to exercise.

Your Honors have heard a somewhat elaborate argument on progressive taxation. That argument might well be addressed, might properly be addressed to a Legislative body. It has no place in an argument to a Court. We have gone into that territory only because we felt obliged to follow, in the course of this argument, the lead that was set for us by the learned counsel on the other side. They wish to hold up before this Court the spectre of communism, and they say that the tendency of this legislation is to diffuse wealth. Well, if your Honors please, since the first organization of our government, the American policy has been the diffusion of wealth. In that regard our policy is distinguished from England and from the continental countries of Europe. We abolished promogeniture for the very purpose of compelling a diffusion of wealth, the distribution of wealth, and not permitting it to accumulate in families as it did in Great Britain. I admit that the necessary tendency, influence and operation of such legislation as this is to diffuse property, not to allow it to accumulate in great aggregations in families, and thus make its power dangerous to the State and to the Republic. One of the great dangers of our day is the accumulation, the aggregation of immense personal wealth in the hands of individuals so that they are able to corrupt Legislatures and Congresses, and to defy Courts. Every thoughtful and patriotic student of American politics has felt alarm at the tendency in this day to aggregate immense wealth in the hands of families and individuals. It is a recognized danger to the State just as promogeniture and the holding of entailed estates was recognized by the early fathers of the Republic to be incompatible with free institutions.

This law tends to diffuse estates, and to distribute them into the hands of many, instead of leaving this corrupting power of aggregate wealth in the hands of a few.

When counsel draw their inspiration from economists of the old world they should remember that the policy of this nation is not the policy of England.

They cite to this Court in argument the views of Mr. Lecky, who is indeed honorably known as a historian and literary man, but totally unknown as an economist, and who, because Mr. Gladstone and his liberal parliament imposed new death duties in England, wrote the work from which learned counsel quotes very much as an apologist for toryism in Great Britain; such an authority an American lawyer cites to the Supreme Court of the United States as suggesting the policy that the Court should approve on the question of taxing inheritances. When such a writer is cited as one whose ideas as to the concentration of property are to be imposed on us, I take the liberty of quoting to this Court the views of an eminent citizen whose opinion is not less entitled to respect because he is a member of this bench—who recognizes the policy and tendency of this legislation. Mr. Justice Brewer says:

“I have often urged the thought, as one of the most just of taxes, and if it were granted in proportion to the amount of property passing, I think it would be most beneficial. It would tend largely to prevent the accumulation of property in family line, and work that distribution which is for the interest of all.”

Mr. Justice Fuller: That was not a judicial decision.

Mr. Moran: Not a judicial utterance, your Honor. I do not cite that as binding upon the learned judge as a judicial expression. But is it not as much entitled to the respect of this Court as the opinion of Mr. Lecky upon that question? I only cite this because it accords with the conviction that will enter the mind of any intelligent citizen. The expression recognizes that the tendency of such legislation is American in tone and character; that it sustains the policy we adopted when we abolished primogeniture and required that property should pass equally to lineals, and equally to collaterals.

Another reason, your Honors: It is the universal experience in this country that these great aggregations of personal wealth escape their due proportion of taxation. Men who are able to build up these vast fortunes, this vast personal wealth, seem to be endowed with the cunning which enables them to escape the assessor and avoid the imposition of the just burden upon property in their hands.

We show in our brief that it is stated by a gentleman of, I assume, reputation in Massachusetts, that in that State personal property escapes taxation to such an extent that the State loses from \$14,000,000 to \$15,000,000 a year. Now, it is no doubt true that the man who evades his taxes in his lifetime will more than willingly submit to pay his taxes when he is dead. Most of us will be more willing to pay our taxes when we are dead. We are here for a period, and we enjoy this property while we have it. But, when we are dead, we are dead for a very long time, and we have but little use for property.

It has been said that there is nothing certain but death and tax. If your Honors please, death is certain, but the experience of every state and every municipality in this Union demonstrates this one

thing, as a most important fact, in our present governmental life, that taxation is not certain. This law finally makes taxes as certain as death.

Of course these are considerations with which your Honors have nothing to do, but they have been imposed upon you by the industry and ingenuity and splendid capacity of learned and distinguished counsel who attack this law. But, with all their ability, with all their research, with all their industry, they have produced to this Court an argument that is mighty only in its fallacies, and beautiful only by the ingenuity with which its errors are concealed. Their propositions have no support in law, no support in logic. They ask this Court to hold inheritance tax laws void because the tax is progressive.

They ask this Court to say, by the decision of this case, that inheritance and testamentary capacity are natural rights, protected by law, vested, and that any attempt of the Legislature to divest them or to control them is subject to constitutional limitation and inhibition. They ask this Court to take the place of the Legislature of Illinois. They ask your Honors to find in the Fourteenth Amendment a principle which they say is potential in it, but which, when that amendment was adopted, was not in the mind or thought, or comprehension of the men who voted in favor of it, or of the states when they agreed to it. If the Fourteenth Amendment of the Constitution prohibits the people of the states from regulating, by such conditions as they see fit to impose, these franchises and privileges which they grant, it is time that it was repealed, and that there should be something adopted in place of it more in consonance with the idea of my learned friends, that ambiguous text of scripture—

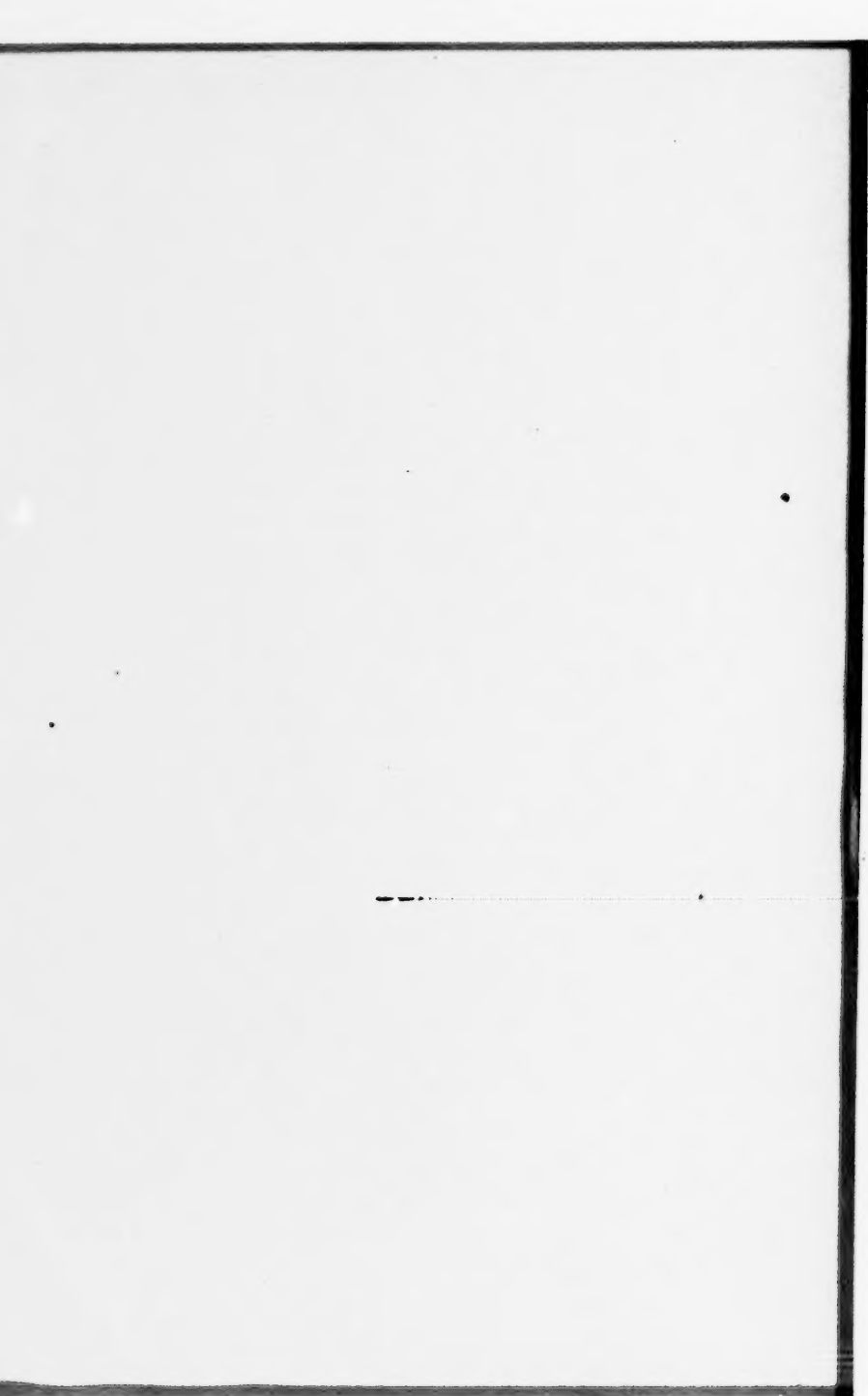
for instance: "To him that hath shall be given, from him that hath not shall be taken away even that which he hath."

The poor man! Why, it is the poor *millionaire* whose voice your Honors hear in opposition to this law. It is the poor aggregator of immense wealth, building it up, controlling it, managing it, and avoiding the just burden upon it. It is the building up of "clawses," as Mr. Lecky would say, maintaining the classes and their privileges by not subjecting them, in the passing of their property to their posterity, to the imposition of a bonus which might make up to the State for all that by a life of industrious concealment and avoidance of taxes they have filched from the State by evading the just burdens that they should have discharged to the government which has afforded them both protection and opportunity.

If we have not now heard, if your Honors please, all the grounds upon which my learned friends undertake to assail this law, it is their fault, not ours. I have dealt with all the propositions contained in their brief. Those propositions, I think, your Honors will determine as soon as you read them to be untenable. I know the world-wide reputation of the honorable and distinguished gentleman (Mr. Harrison) who is to follow me in this case. But I know the wisdom, the acumen and the learning of this Court. I know its patience in search, its fearlessness in determination. It is here to announce the law, not to make it. It is here to declare what it is, and not to criticise its policy. It is here to say to Illinois: You are a sovereign State; you grant your privileges and impose upon them such conditions as you see fit; for unwise legislation or unjust discrimination you must answer to the citizens you represent. The power to correct

is in the hands of your own people, and is not to be exercised by the Federal Court.

I thank your Honors for the attention which you have given me in this rather long and somewhat desultory argument.



Statement of the Case.

MAGOUN v. ILLINOIS TRUST AND SAVINGS
BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

No. 464. Argued January 28, 1898. — Decided April 25, 1898.

The inheritance tax law of Illinois, of June 15, 1895, (Laws of 1895, page 301), makes a classification for taxation which the legislature had power to make, and does not conflict in any way with the provisions of the Constitution of the United States.

THIS was a bill in equity filed in the Circuit Court of the United States in and for the Northern District of Illinois by Jessie Norton Torrence Magoun, a resident and citizen of New York, against the Trust Company, as executor of and trustee under the last will and testament of Joseph T. Torrence, deceased, and the county treasurer of Cook County, Illinois, both residents and citizens of Illinois, to remove a cloud from the real estate devised by said decedent to the complainant, and to enjoin the first-named defendant from voluntarily paying, and the county treasurer from collecting or receiving, the inheritance tax, amounting to more than \$5000, alleged to be due upon the entire estate of said decedent, and for which the complainant's interest in said estate was contended by the county treasurer to be liable.

The bill set forth the will of the decedent, a description and valuation of the real estate and personal property left by him, amounting in all to \$600,000 above his debts, and the demand of the county treasurer for the inheritance tax, which, by the act in question, is made a lien upon all of said property, the request of the complainant to the defendant Trust Company not to pay the same and to contest the constitutionality of the act; to refrain from paying the same voluntarily and without protest, and to await the commencement of legal proceedings to enforce the same; the refusal of the Trust Company to comply with this request, and its threat and in-

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tention to pay said tax at once voluntarily, which payment could not be recovered if said law should hereafter be declared unconstitutional.

The bill also alleged that such payment would result in waste of the estate, and would be a breach of trust on the part of said executor, to the irreparable loss and injury of the complainant; that the alleged lien of the tax clouds the title to the real property and renders the same unmarketable, and that the act is in conflict with the provisions of the Fourteenth Amendment.

The Trust Company answered, admitting the allegations of fact in the bill, but submitting the question of the constitutionality of the law to the court and praying to be advised of its rights and duties in the premises as executor and trustee aforesaid and as an officer of the court.

The county treasurer denied that the act was unconstitutional, and admitted the allegations respecting the estate of the deceased, the interest of the complainant therein, the lien of the inheritance tax thereon and the demand made therefor.

The cause was heard on bill and answers, and a decree was entered dismissing the bill from which an appeal was prayed to this court and allowed.

The act under which the taxes complained of were assessed is entitled "An act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same." Rev. Stat. Illinois, 1895, c. 120. It is only necessary to quote its first and second sections, which are as follows:

"§ 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, all property, real, personal and mixed which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State, or if decedent was not a resident of this State at the time of his death, which property or any part thereof shall be within this State or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor or bargainor or intended to take effect, in possession or enjoyment after such death, to any

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person or persons or to any body politic or corporate in trust or otherwise, or by reason whereof any person or body politic or corporation shall become beneficially entitled in possession or expectation to any property or income thereof, shall be, and is, subject to a tax at the rate hereinafter specified to be paid to the treasurer of the proper county for the use of the State, and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. When the beneficial interest to any property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son or the husband of the daughter, or any child or children adopted as such in conformity with the laws of the State of Illinois, or to any person to whom the deceased, for not less than ten years prior to death, stood in the acknowledged relation of a parent, or to any lineal descendant born in lawful wedlock, in every such case the rate of tax shall be one dollar on every hundred dollars of the clear market value of such property received by each person, and at and after the same rate for every less amount, provided that any estate which may be valued at a less sum than twenty thousand dollars shall not be subject to any such duty or taxes, and the tax is to be levied in above cases only upon the excess of twenty thousand dollars received by each person. When the beneficial interests to any property or income therefrom shall pass to or for the use of any uncle, aunt, niece, nephew or any lineal descendant of the same, in every such case the rate of such tax shall be two dollars on every one hundred dollars of the clear market value of such property received by each person on the excess of two thousand dollars so received by each person. In all other cases the rate shall be as follows: On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount; on all estates of ten thousand dollars and less, three dollars; on all estates of over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on

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all estates over fifty thousand dollars, six dollars: Provided, That an estate in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax.

"§ 2. When any person shall bequeath or devise any property or interest therein or income therefrom to mother, father, husband, wife, brother and sister, the widow of a son, or a lineal descendant during the life or for a term of years or remainder to the collateral heir of the decedent, or to the stranger in blood or to the body politic or corporate at their decease, or on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax and the property so passing shall be appraised immediately after the death at what was the fair market value thereof at the time of the death of the decedent in the manner herein-after provided, and after deducting therefrom the value of said life estate, or term of years, the tax prescribed by this act on the remainder shall be immediately due and payable to the treasurer of the proper county, and, together with the interests thereon, shall be and remain a lien on said property until the same is paid: Provided, That if the person or persons or body politic or corporate beneficially interested in the property chargeable with said tax elect not to pay the same until they shall come into the actual possession or enjoyment of such property, in that case said person or persons or body politic or corporate shall give a bond to the people of the State of Illinois in the penalty three times the amount of the tax arising upon such estate with such sureties as the county judge may approve, conditioned for the payment of the said tax, and interest thereon, at such time or period as they or their representatives may come into the actual possession or enjoyment of said property, which bond shall be filed in the office of the county clerk of the proper county: Provided, further, That such person shall make a full, verified return of said property to said county judge, and file the same in his office within one year from the death of the decedent, and within that period enter into such securities and renew the same for five years."

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Two other cases were argued and submitted with this case, to wit, *Josephine C. Drake et al., Executors, etc., Plaintiffs in Error*, v. *Daniel H. Kochersperger, County Treasurer, etc., Cook County, Illinois*, error to the Supreme Court of the State of Illinois; and *Elizabeth Emerson Sawyer et al., Executors, etc., Plaintiffs in Error*, v. *The Same*, error to the Circuit Court of the United States for the Northern District of Illinois.

In the *Drake case* the Supreme Court of the State of Illinois sustained the statute as consonant with the constitution of the State. 167 Illinois, 122.

Mr. William D. Guthrie and *Mr. Benjamin Harrison* for plaintiffs in error. *Mr. Eugene E. Prussing* was on their brief.

Mr. Edward C. Akin and *Mr. Thomas A. Moran* for defendants in error. *Mr. Robert S. Iles* and *Mr. Frank L. Shepard* were on their brief.

MR. JUSTICE McKENNA, after stating the case, delivered the opinion of the court.

Legacy and inheritance taxes are not new in our laws. They have existed in Pennsylvania for over sixty years, and have been enacted in other States. They are not new in the laws of other countries. In *State v. Alston*, 94 Tennessee, 674, Judge Wilkes gave a short history of them as follows: "Such taxes were recognized by the Roman law. Gibbon's *Decline and Fall of the Roman Empire*, vol. 1, pp. 163-4. They were adopted in England in 1780, and have been much extended since that date. Dowell's *History of Taxation in England*, 148; Acts 20 George III, c. 28; 45 George III, c. 28; 16 and 17 Victoria, c. 51; *Green v. Craft*, 2 H. Bl. 30; *Hill v. Atkinson*, 2 Merivale, 45. Such taxes are now in force generally in the countries of Europe. (Review of Reviews, February, 1893.) In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Vir-

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ginia, 1887, and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, 1891; Tennessee in 1891, chapter 25 now repealed by chapter 174, acts 1893. They were adopted in North Carolina in 1846, but repealed in 1883. Were enacted in Virginia in 1844, repealed in 1855, reënacted in 1863, and repealed in 1884." Other States have also enacted them — Minnesota by constitutional provision.

The constitutionality of the taxes have been declared, and the principles upon which they are based explained in *United States v. Perkins*, 163 U. S. 625, 628; *Strode v. Commonwealth*, 52 Penn. St. 181; *Eyre v. Jacob*, 14 Grat. 422; *Schoolfield v. Lynchburg*, 78 Virginia, 366; *State v. Dalrymple*, 70 Maryland, 294; *Clapp v. Mason*, 94 U. S. 589; *In re Merriam's Estate*, 141 N. Y. 479; *State v. Hamlin*, 86 Maine, 495; *State v. Alston*, 94 Tennessee, 674; *In re Wilmerding*, 117 California, 281; *Dos Passos Collateral Inheritance Tax*, 20; *Minot v. Winthrop*, 162 Mass. 113; *Gelsthorpe v. Furnell*, [Montana] 51 Pac. Rep. 267. See also *Scholey v. Rew*, 23 Wall. 331.

It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right — a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation.

The second principle was given prominence in the arguments at bar. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir to everybody, and the appellant asserted a natural right of children to inherit. Of the former proposition we are not required to express an opinion. Nor indeed of the latter, for appellant conceded that testamentary disposition and inheri-

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tance were subject to regulation. However, as pertinent to the subject, decisions of this court may be cited.

In *United States v. Fox*, 94 U. S. 315, 320, a law of the State of New York confining devises to natural persons and corporations created under its laws was considered, and a devise of land to the United States was held void. The court said :

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick v. Sullivant*, 10 Wheat. 202. . . . Statutes of wills, as is justly observed by the Court of Appeals, are enabling acts, and prior to the statute of 32 Henry VIII there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English Statute of Wills became a part of the law of New York upon the adoption of her constitution in 1777; and, with some modification in its language, remains so at this day. Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all. His power is bounded by its conditions."

In *Mager v. Grima*, 8 How. 490, 493, there was considered the validity of a law of Louisiana imposing a tax of ten per cent upon legacies, when the legatee was neither a citizen of the United States nor domiciled therein. Mr. Chief Justice Taney considered the legal question of easy solution, and disposed of it summarily. He said: "This is a plain case, and when the facts are stated the questions of law may be disposed of in a few words." After stating the case briefly, he further said:

"Now, the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of

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regulating the manner and term upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take has been given to the alien, subject to a deduction of ten per cent for the use of the State.

"In some of the States laws have been passed at different times imposing a tax similar to the one now in question upon its own citizens as well as foreigners, and the constitutionality of these laws has never been questioned. And if a State may impose it upon its own citizens, it will hardly be contended that aliens are entitled to exemption; and that their property in our own country is not liable to the same burdens that may lawfully be imposed upon that of our own citizens.

"We can see no objection to such a tax, whether imposed on citizens and aliens alike, or upon the latter exclusively."

In *United States v. Perkins*, 163 U. S. 625, 627, the inheritance tax law of the State of New York was involved. Mr. Justice Brown, speaking for this court, said:

"While the laws of all civilized States recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control. 'By the common law, as it stood in the reign of Henry II, a man's goods were to be divided into three equal parts; of which one went to his

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heirs or lineal descendants, another to his wife, and a third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so, *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal.' 2 Bl. Com. 492. Prior to the statute of wills, enacted in the reign of Henry VIII, the right to a testamentary disposition of the property did not extend to real estate at all, and as to personal estate was limited as above stated. Although these restrictions have long since been abolished in England, and never existed in this country, except in Louisiana, the right of a widow to her dower and to a share in the personal estate is ordinarily secured to her by statute.

"By the Code Napoleon, gifts of property, whether by acts *inter vivos* or by will, must not exceed one half the estate if the testator leave but one child, one third if he leaves two children; one fourth if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one half of his property, and but three fourths if he have ancestors in but one line. By the law of Italy, one half a testator's property must be distributed equally among all his children; the other half he may leave to his eldest son or to whomsoever he pleases. Similar restrictions upon the power of disposition by will are found in the codes of other continental countries, as well as in the State of Louisiana. Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good."

Against the cases sustaining inheritance taxes and their classifications and exemptions, appellants cite *State v. Mann*, 76 Wisconsin, 469; *State v. Gorman*, 40 Minnesota, 232; *Curry v. Spencer*, 61 N. H. 624; *State v. Ferris*, 53 Ohio St. 314, and *Missouri v. Switzer*, lately decided.

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These cases are not in all points irreconcilable with those first cited. *Curry v. Spencer* is extreme. It was held that an exception from an otherwise general inheritance law of legacies to husband or wife, children or grandchildren, of the person who died last seized offended the rigid uniformity of the constitution of that State and its bill of rights. The court however said, speaking by Blodgett, J.: "It is not to be questioned that the power to tax is vested in the legislature; that it is unrestricted, except when it is opposed to some provision of the Federal or state constitution, and that it extends to every trade or occupation, to every object of industry, use or enjoyment, and to every species of possession." And quoting 2 Bl. Com. 12, he further said: "Wills, therefore, testaments, and rights of inheritances and successions are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them."

In *State v. Mann* and *State v. Gorman*, the distinction between a tax on successions and one on property was not necessary to observe. *State v. Gorman*, however, may be claimed as deciding that a tax based on the value of the estates is contrary to the rule of equality; also that exemptions are. *State v. Ferris* and *State v. Switzer* do not oppose the principles upon which inheritance taxes are sustained, but only decide that the statutes passed on were repugnant to equality and uniformity of taxation as prescribed by the state constitutions. They are authority against the Illinois statute. But it is not necessary to dwell on the points of agreement of the cases. Our inquiry must be not what will satisfy the provisions of the state constitutions, but what will satisfy the rule of the Federal Constitution. The power of the States over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws.

This brings us to the law in controversy. The appellant attacks both its principles and its provisions — its principles as necessarily arbitrary and its provisions as causing discriminations and creating inequality in the burdens of taxation.

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Is the act open to this criticism? The clause of the Fourteenth Amendment especially invoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it "only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances." *Kentucky Railroad Tax cases*, 115 U. S. 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes v. Missouri*, 120 U. S. 68. Similar citations could be multiplied. But what is the test of likeness and unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustration it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in *Mobile County v. Kimball*, 102 U. S. 691, that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. And he observed in another case: "It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity."

The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or

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profession than B, it may. And in matters not of taxation, if A be a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B, *Missouri Pacific Railway v. Mackey*, 127 U. S. 205, to a different measure of damages than B, *Minneapolis & St. Louis Railway v. Beckwith*, 129 U. S. 26, and it permits special legislation in all of its varieties. *Missouri Pacific Railway v. Mackey*, 127 U. S. 205; *Minneapolis and St. Louis Railway v. Herrick*, 127 U. S. 210; *Duncan v. Missouri*, 152 U. S. 377.

In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course. "Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition," said Mr. Justice Bradley, in *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232, 237.

And Mr. Justice Brewer, in *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150, 165, after a careful consideration of many cases, said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground — some difference which bears a just and proper relation to the attempted classification — and is not a mere arbitrary selection."

Two principles, therefore, must be reconciled in the Illinois inheritance law if it is to be sustained, the equality of protection of the laws guaranteed by the Fourteenth Amendment, and the power of the State to classify persons and property. The latter principle needs further consideration. What test is there of the reasonableness of a classification — of one based upon "some difference which bears a just and proper relation to the attempted classification — and is not a mere arbitrary selection?" Legislation special in character is not forbidden by it, as we have seen. Treating mechanics as a class, and

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giving them a lien for the amount of their work, has been held reasonable. Charging a railroad corporation and not other corporations or persons with an attorney's fee has been held unreasonable, yet the former would seem to be as much an exclusive favor as the latter an exclusive burden.

Of taxation, and the case at bar is of taxation, Mr. Justice Bradley said in the *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232, and Mr. Chief Justice Fuller in *Giozza v. Tiernan*, 148 U. S. 657, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. The range of the State's power was expressed by Mr. Justice Bradley, as follows: "It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State framing their constitution."

And so Mr. Justice Miller, speaking for the court in *Davidson v. New Orleans*, 96 U. S. 97, 105, said: The Federal Constitution imposes no restraints on the State in regard to unequal taxation.

The court, through Mr. Justice Lamar, in *Pacific Express Co. v. Seibert*, 142 U. S. 339, was equally emphatic. He said on page 351: "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or from being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destruc-

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tive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens." And it was said in *Merchants' Bank v. Pennsylvania*, 167 U. S. 461: "Indeed, this whole argument of a right under the Federal Constitution to challenge the tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap Railroad v. Pennsylvania*."

There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. Bearing these considerations in mind we can solve the questions in controversy.

There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The first two classes, therefore, depend on substantial differences, differences which may distinguish them from each other and them or either of them from the other class — differences, therefore, which "bear a just and proper relation to the attempted classification" — the rule expressed in the *Gulf, Colorado & Santa Fé Railway v. Ellis*, 165 U. S. 150. And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates "equally and uniformly upon all persons in similar circumstances."

But the appellant asserts discrimination, and claims that the exemptions produce the greatest inequality. As stated above, the Supreme Court of the State of Illinois passed on and sustained the law in the *Drake case*, and, claiming the opinion for support, the appellant contends that there are two distinct systems and principles applied in the act, the one basing the tax on the amount received or the value of the

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privilege of succession; the other basing the tax upon the estate owned by the decedent, irrespective of the amount or value of the legacy. And discriminations hence resulting, or rather which are claimed as hence resulting, are detailed.

We, however, do not read the opinion as counsel do. In answer to the objection that the statute offended against uniformity or proportion to valuation as prescribed by the constitution of Illinois, the court said:

"That statute provides certain classes of property, which were a part of an estate, shall be exempt from taxation under these provisions; and when the legislature provides other classes of property, some of which shall pay one dollar per hundred, others two, others three and others four, and still others five, and again others six dollars per hundred, six different classes are created under and by which a tax is levied by valuation on the right of succession to a separate class of property.

"The class on which a tax is thus levied is general, uniform, and pertains to all species of property included within that class. A tax which affects the property within a specific class is uniform as to the class, and there is no provision of the constitution which precludes legislative action from assessing a tax on that particular class. By this act of the legislature six classes of property are created heretofore absolutely unknown. *It is those classes of property depending upon the estate owned by one dying possessed thereof which the State may regulate as to its descent and the right to devise.* The tax assessed on classes thus created is absolutely uniform on the classes upon which it operates, and under the provisions of the statute is to be determined by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property inherited, and is not inconsistent with the principle of taxation fixed by the constitution, and is clearly within the sections of the constitution quoted. No want of uniformity with one living who owns property can be urged as a reason why the statute makes an inconsistent rule. No person inherits property or can take by devise except by the statute; and the State, having power to regulate this ques-

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tion, may create classes and provide for uniformity with reference to classes which were before unknown."

The words which we have italicized are urged to support appellant's contention, but it is manifest that they do not do so when considered in relation to that which precedes and follows them, and it is, therefore, the estates which descend or are received which the court decides are new property, and which are to pay a tax in proportion to their value.

Appellant, however, says: "The progression is likewise unnecessarily arbitrary if we take the view that the tax is levied on the amount received. . . . Under such an assumption those taking the larger amounts are required to pay a larger rate on the same sums upon which those taking smaller sums pay a smaller rate; that is to say, one who receives a legacy of \$10,000 pays 3 per cent, or \$300, thus receiving \$9700 net, while one receiving a legacy of \$10,001 pays 4 per cent on the whole amount, or \$400.04, thus receiving \$9600.96, \$99.04 less than the one whose legacy was actually one dollar less valuable. This method is applied throughout the class. Other examples might be stated."

The reasoning of appellant is based on the view that the tax is one on property instead of one on the succession, as held by the Supreme Court of the State. Being on the succession, the court further held, as we have seen, that the latter is to be regarded as new property, and the \$20,000 and other property not taxed are not, therefore, exemptions.

In this view the Illinois court is in harmony with the majority of other courts of the country. We concur in the reasoning. It is true that the amount of the exemption is greater in the Illinois law than in any other, but the right to exempt cannot depend on that. Whether it shall be \$20,000 as in Illinois law or \$10,000 as in that of Massachusetts, or other amounts as in other laws, must depend upon the judgment of the legislature of each State, and cannot be subject to judicial review. If such review could ascertain the factors of judgment and could apply them with indisputable wisdom to the different conditions existing, it would be outside of its province to do so. That manifestly is a legislative, not a judicial, function.

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The first and second cases, therefore, of the statute depend on substantial distinctions and their classifications are not arbitrary. Nor do the exemptions of the statute render its operation unequal within the meaning of the Fourteenth Amendment. "The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them, and must consequently be understood to exist in the lawmaking power wherever it has not in terms been taken away. To some extent it must exist always, for the selection of subjects of taxation is of itself an exemption of what is not selected." Cooley on Taxation, 200. See, also, the remarks of Mr. Justice Bradley in *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232.

The provisions of the statute in regard to the tax on legacies to strangers to the blood of an intestate need further comment. These provisions are as follows:

"On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount on all estates of ten thousand dollars and less, three dollars; on all estates over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars, six dollars; Provided, that an estate in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax."

There are four classes created, and manifestly there is equality between the members of each class. Inequality is only found by comparing the members of one class with those of another. It is illustrated by appellant as follows: One who receives a legacy of \$10,000 pays 3 per cent, or \$300, thus receiving \$9700 net; while one receiving a legacy of \$10,001 pays 4 per cent on the whole amount, or \$400.04, thus receiving \$9600.96, or \$99.04 less than the one whose legacy was actually one dollar less valuable. This method is applied throughout the class.

These, however, are conceded to be extreme illustrations, and we think, therefore, that they furnish no test of the

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practical operation of the classification. When the legacies differ in substantial extent, if the rate increases the benefit increases to greater degree.

If there is unsoundness it must be in the classification. The members of each class are treated alike, that is to say, all who inherit \$10,000 are treated alike—all who inherit any other sum are treated alike. There is equality therefore within the classes. If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount but varies with the amounts arbitrarily fixed, and hence that an inheritance of \$10,000 or less pays 3 per cent, and that one over \$10,000 pays not 3 per cent on \$10,000 and an increased percentage on the excess over \$10,000 but an increased percentage on the \$10,000 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of ten thousand and one dollars by the deduction of the tax receives \$99.04 less than one who is given a legacy of \$10,000. But neither case can be said to be contrary to the rule of equality of the Fourteenth Amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality, nevertheless

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they are universally imposed and their legality has never been questioned. We think the classification of the Illinois law was in the power of the legislature to make, and the decree of the Circuit Court is

Affirmed.

MR. JUSTICE BREWER dissenting.

I am unable to concur in the foregoing opinion, so far as it sustains the constitutionality of that part of the law which grades the rate of the tax upon legacies to strangers by the amount of such legacies. If this were a question in political economy I should not dissent, but it is one of constitutional limitations. Equality in right, in protection and in burden is the thought which has run through the life of this Nation and its constitutional enactments from the Declaration of Independence to the present hour. Of course, absolute equality is not attainable, and the fact that a law, whether tax law or other, works inequality in its actual operation does not prove its unconstitutionality. *Merchants' Bank v. Pennsylvania*, 167 U. S. 461. But when a tax law directly, necessarily and intentionally creates an inequality of burden, it then becomes imperative to inquire whether this inequality thus intentionally created can find any constitutional justification.

That this is a law imposing taxes is not open to question. The title of the act is "An Act to Tax Gifts, Legacies, etc.," and the first section provides that "all property . . . which shall pass by will or by the intestate laws of this State . . . shall be, and is, subject to a tax at the rate hereinafter specified." Classifying inheritors and legatees into the three classes of near relatives, remote relatives and strangers, and imposing a different rate of taxation as to each of these classes, may not be objectionable. The classification is based upon differences which bear just and proper relation to it, and where classification is rightful, differences in the rate of taxation may be, so far as the Federal Constitution is concerned, permissible. But beyond this classification the statute provides that as to the third class, that is, strangers, the rate of taxation shall vary with the amount of the estate. In other

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words, the actual tax to be paid does not increase simply as the legacy increases, which would be the rule of equality, but the rate of taxation is also increased as the amount of the legacy passes from one sum to another. Upon a legacy over fifty thousand dollars it is six per cent, while upon one under ten thousand dollars it is only three per cent.

It seems to be conceded that if this were a tax upon property such increase in the rate of taxation could not be sustained, but being a tax upon the succession it is held that a different rule prevails. The argument is that because the State may regulate inheritances and the extent of testamentary disposition it may impose thereon any burdens, including therein taxes, and impose them in any manner it chooses. There are doubtless some matters over which the State has purely arbitrary power. For instance, it is under no obligations to grant any charters, and the legislature may undoubtedly in giving a charter to one set of persons impose one series of burdens, and in granting a similar charter to another set may impose entirely different burdens. But these are cases of mere gratuities, mere favors and privileges, and any donor of such may add to them the burdens he pleases. But I do not understand that legacies and inheritances stand upon the same footing. True, the State may regulate, but it has no arbitrary power in the matter. The property of a decedent does not at his death become the property of the State, nor subject to its disposal according to any mere whim or fancy. And yet if it is a purely arbitrary power I do not see what constitutional objection could be raised to any disposition which a legislature might make of the property of any decedent. Take the illustration made by counsel for appellant: Could the legislature of Illinois, which passed this statute, constitutionally enact that the estate of every person dying within the limits of the State should be given to the members of that legislature? Or, if the matter of personal benefit be interposed as against the validity of such legislation, could it enact that the property of A, on his death, should pass to the State; the property of B to some religious or charitable institution; and the property of C be divided

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among his children? Can there be a doubt that such inequality of legislation would vitiate it? But whatever may be the power of the legislature, Illinois had regulated the matter of descents and distributions and had granted the right of testamentary disposition. And now by this statute upon property passing in accordance with its statutes a tax is imposed; a tax unequal because not proportioned to the amount of the estate; unequal because based upon a classification purely arbitrary, to wit, that of wealth—a tax directly and intentionally made unequal. I think the Constitution of the United States forbids such inequality.
